95-1733 (1)

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress violated the Judges' Compensation Clause, U.S. Const., Art. III, § 1, when it extended the coverage of the Medicare hospital insurance program and the Social Security old-age, survivors, and disability insurance programs, including the taxes financing those programs, to the employment of Article III judges.

PARTIES TO THE PROCEEDINGS

The United States was the defendant in the Court of Federal Claims and the appellee in the court of appeals.

Respondents, who were plaintiffs in the Court of Federal Claims and appellants in the court of appeals, are Judges Terry J. Hatter, Jr., Peter H. Beer, Dudley H. Bowen, Jr., A.J. McNamara, Harry Pregerson, Raul A. Ramirez, Norman C. Roettger, Jr., Thomas A. Wiseman, Jr., Terence T. Evans, Henry A. Mentz, Jr., Wilbur D. Owens, Jr., Henry R. Wilholt, Jr., Harold A. Baker, and Michael M. Mihm; and Mary Martin Arceneaux, on behalf of the late Judge George Arceneaux, Jr, and Dolores Lee Burciaga, on behalf of the late Judge Juan G. Burciaga.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	4
Reasons for granting the petition	14
Conclusion	27
Appendix A	1a
Appendix B	14a
Appendix C	38a
Appendix D	48a
Appendix E	55a
Appendix F	57a

TABLE OF AUTHORITIES

Cases:

Atkins v. *United States*, 556 F.2d 1028 (Cl. Ct. 1977), cert. denied, 434 U.S. 1009 (1978) 11, 14-15, 22, 23

Collector v. *Day*, 78 U.S. (11 Wall.) 113 (1871) ... 16, 21

Duplantier v. *United States*, 606 F.2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981) 15

Evans v. *Gore*, 253 U.S. 245 (1920) 9, 10, 14, 16, 17, 18, 19, 20, 22

Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939) 21

Jefferson County v. *Acker*, 61 F.3d 898 (11th Cir. 1996) 15

Miles v. *Graham*, 268 U.S. 501 (1925) 10, 17, 18, 19

O'Malley v. *Woodrough*, 307 U.S. 277 (1939) 10, 11, 14, 17, 18, 19, 21, 24, 25

Pollock v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) 16, 20-21

Robinson v. *Sullivan*, 905 F.2d 1199 (8th Cir. 1990) 15

Cases—Continued Page

Rodriguez de Quijas v. *Shearson/American Express Co.*, 490 U.S. 477 (1989) 13, 14
South Carolina v. *Baker*, 485 U.S. 505 (1988) 20
South Corp. v. *United States*, 690 F.2d 1368 (Fed. Cir. 1982) 11
United States v. *American Bar Endowment*, 477 U.S. 105 (1986) 16
United States v. *Hill*, 113 S. Ct. 941 (1993) 16
United States v. *Will*, 449 U.S. 200 (1980) 18, 19, 21-22, 26

Constitution and statutes:

U.S. Const.:
Art. III, § I (Judges' Compensation Clause) ..... *passim*
Civil Service Retirement System, 5 U.S.C. 8331 *et seq.* 6, 8, 12
Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 15
Social Security Amendments of 1983, Pub. L. No. 93-21, 97 Stat. 65 ..... 5, 7
§ 101, 97 Stat. 67-70 9
§ 101, 97 Stat. 68 7
§ 101(b)(1), 97 Stat. 69 5
§ 101(b)(2), 97 Stat. 70 5
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Tit. II, Subtit. E, Pt. III, § 278, 96 Stat. 559-563 ..... 5, 7, 8
§ 278, 96 Stat. 559 5
§ 278, 96 Stat. 560 7
Tucker Act, 28 U.S.C. 1491(a)(1) 10, 15
26 U.S.C. 3101 6
26 U.S.C. 3101(a) 2, 4
26 U.S.C. 3101(b) 2-3, 4
26 U.S.C. 3121 ..... 3, 5
26 U.S.C. 3121(b) 3, 4, 5
26 U.S.C. 3121(b)(5) 3, 5, 6, 8
26 U.S.C. 3121(b)(6)(A) (1976) 5

Statutes: Page

26 U.S.C. 3121(u) 4, 5
26 U.S.C. 3121(u)(1)(A) (1982) 5
26 U.S.C. 6511(a) 25
28 U.S.C. 371 5
28 U.S.C. 371(a) 6
28 U.S.C. 455(a) 26
28 U.S.C. 455(b)(4) 25, 26
28 U.S.C. 2401(a) 25
42 U.S.C. 402(a) 7
42 U.S.C. 409(a) 7
42 U.S.C. 410(a)(5)(E) (1976) 7
42 U.S.C. 410(a)(6)(A) (1976) 7
42 U.S.C. 410(p)(2) (1982) 7
42 U.S.C. 413(a)(2)(A) 7
42 U.S.C. 414(a)(2) 7
42 U.S.C. 426 7
42 U.S.C. 426(a)(2)(A) 7

Miscellaneous:

Exec. Order No. 12,387, 47 Fed. Reg. 44,981 (1982) ... 26
Exec. Order No. 12,456, 49 Fed. Reg. 347 (1984) 26
Exec. Order No. 12,698, 54 Fed. Reg. 53,473 (1989) ... 26
H.R. Rep. No. 25, 98th Cong., 1st Sess. (1983) 9
S. Rep. No. 494, 97th Cong., 2d Sess. (1982) 9

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a), is reported at 64 F.3d 647. The opinion of the United States Court of Federal Claims, formerly the United States Claims Court (App., *infra*, 14a-37a), is reported at 31 Fed. Cl. 436. A prior opinion of the court of appeals (App., *infra*, 38a-47a) is reported at 953 F.2d 626. A prior opinion of the United States Claims Court (App., *infra*, 48a-54a) is reported at 21 Cl. Ct. 786.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1995. A petition for rehearing was denied on December 26, 1995. App., *infra*, 55a-56a. On March 15, 1996, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 24, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Judges' Compensation Clause of Article III, Section 1, of the United States Constitution provides that "[t]he Judges, both of the supreme and inferior courts, * * * shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

2. Section 3101 of Title 26, United States Code, provides, in part:

> **(a) Old-age, survivors, and disability insurance**
>
> In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—
>
> * * * * *
>
> **(b) Hospital insurance**
>
> In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following

percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) * * * .

3. Section 3121 of Title 26, United States Code, provides in part:

> **(b) Employment**
>
> For purpose of this chapter, the term "employment" means any service, of whatever nature, performed * * * ; except that such term shall not include— * * *
>
> > (5) service performed in the employ of the United States or any instrumentality of the United States * * * ; except that this paragraph shall not apply with respect to any such service performed on or after any date on which such individual performs— * * *
> >
> > > (E) service performed as the Chief Justice of the United States, an Associate Justice of the Supreme Court, a judge of a United States court of appeals, a judge of a United States district court (including the district court of a territory), a judge of the United States Court of Federal Claims, a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States magistrate, or a referee in bankruptcy or United States bankruptcy judge[.]
> >
> > * * * * *

(u) Application of hospital insurance tax to Federal, State, and local employment

(1) Federal employment

For purposes of the taxes imposed by sections 3101(b) and 3111(b), subsection (b) shall be applied without regard to paragraph (5) thereof.

STATEMENT

This case concerns the constitutionality of Congress's actions in 1983 and 1984 in bringing Article III judges (along with other federal employees) within the coverage of the Medicare hospital insurance program and the Social Security old-age, survivors, and disability insurance (OASDI) programs. Those actions extended the taxes financing those programs to the salaries of federal employees, including federal judges. Respondents are 16 federal judges who were appointed to the federal bench prior to 1983. In 1989, they sued for a refund or for damages in the amount of the Medicare and OASDI taxes imposed on their salaries after their appointments to the bench. They do not contend that they suffered a reduction in their gross salaries during their tenure. Rather, they argue that, because they were already in office when Congress extended Medicare and OASDI taxes to them, the assessment of those taxes constituted an unconstitutional diminution of their compensation. The court of appeals agreed.[1]

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[1] The taxes on employees' wages that finance in part the OASDI and Medicare programs are imposed by 26 U.S.C. 3101(a) and (b). Both Sections impose a tax on wages with respect to "employment," as defined in 26 U.S.C. 3121(b).

Section 3121(b) and a companion provision, Section 3121(u), have undergone several changes relevant to this case. Before September 3, 1982, Section 3121(b) excluded from the definition of "employment" "service performed in the employ of the United States * * * if such service is covered by a retirement system established by a law of the United States." 26 U.S.C. 3121(b)(6)(A) (1976). That provision exempted Article III judges from the Medicare and OASDI taxes, because those judges were (and are) covered by another retirement system established by 28 U.S.C. 371, which permits judges to retire from active service on annuity or full salary.

Congress extended the Medicare hospital insurance tax to federal judges' salaries in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, Tit. II, Subtit. E, Pt. III, § 278, 96 Stat. 559-563. TEFRA added a new Section 3121(u)(1)(A), which provided that, "[f]or purposes of the [Medicare hospital insurance tax] imposed by section 3101(b) * * * paragraph (6) of [26 U.S.C. 3121(b)] shall be applied without regard to subparagraph[] (A) * * * thereof." 26 U.S.C. 3121(u)(1)(A) (1982); see 96 Stat. 559 (1982). TEFRA, in effect, instructed that the exclusion of federal judges' salaries from the definition of "employment" should be disregarded for purposes of the Medicare hospital insurance tax, and thus extended that tax (but not the OASDI tax) to judges' salaries.

Congress extended the OASDI tax to judges' salaries in the Social Security Amendments of 1983 (1983 Act), Pub. L. No. 98-21, 97 Stat. 65, which again amended 26 U.S.C. 3121. The 1983 Act redefined "employment" in Section 3121(b)(5) generally to exclude "service performed in the employ of the United States," but also excluded from that exclusion service performed by federal judges, among others. See 1983 Act § 101(b)(1), 97 Stat. 69. In addition, the 1983 Act amended Section 3121(u) to provide that, for the purpose of the Medicare tax, Section 3121(b) "shall be applied without regard to paragraph (5) thereof." 1983 Act § 101(b)(2), 97 Stat. 70. Because the 1983 Act excluded service by federal judges from the federal employment exclusion from the general definition of "employment," it subjected federal judges to the Medicare and

1. More than 90% of the paid civilian labor force is engaged in employment covered by the Social Security and Medicare programs. Those employees earn credits towards eligibility for Social Security and Medicare benefits and pay taxes on their wages to finance those programs. App., *infra*, 31a-32a. Before 1983, however, the employment of Article III judges (as well as most other federal employees) was excluded from the Medicare and OASDI programs. Most employees of the legislative and executive branches were required to contribute to the Civil Service Retirement System (CSRS) to obtain a retirement annuity. See 5 U.S.C. 8331 *et seq.* Article III judges were (and are) entitled to retire after meeting certain age and service requirements and to receive lifetime annuities equal to their salary at the time of retirement. See 28 U.S.C. 371(a). Article III judges could also qualify for both Social Security old-age and Medicare benefits on the basis of their prior employment outside the federal system, but they could not receive credits for either Social Security or Medicare coverage based on their federal employment, nor were they subject to OASDI or Medicare taxes on their federal judicial salaries.

On January 1, 1983, employees in all three branches of the federal government for the first time began to earn credits for Medicare coverage on the basis of their federal employment, and became subject to the Medicare hospital insurance portion of the Social

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OASDI taxes of Section 3101, which fall on all wages in respect of employment, unless excluded. Because the same Act directed that the exclusion of federal employees in Section 3121(b)(5) be disregarded for Medicare tax purposes, it again brought federal employees, including judges, within the coverage of the Medicare tax.

Security tax. One year later, on January 1, 1984, those employees also began to earn credits for Social Security coverage on the basis of federal service, and became subject to the OASDI tax.[2] The 1983 and 1984 amendments for the first time imposed Medicare and OASDI taxes on the President, Vice President, cabinet members, political appointees in the Senior Executive Service, Members of Congress, Article III

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[2] Eligibility for Medicare insurance benefits, in general, is tied to eligibility for Social Security old-age benefits. See 42 U.S.C. 426(a)(2)(A). Eligibility for old-age benefits is based on an individual's having paid OASDI taxes for 40 "quarters of coverage." See 42 U.S.C. 402(a), 414(a)(2). "Quarters of coverage" is tied to payment of "wages," which is defined in terms of remuneration for "employment." See 42 U.S.C. 409(a), 413(a)(2)(A).

Federal judges' entitlement to old-age and Medicare benefits has been extended in a series of enactments connected to the extensions of their coverage under the OASDI and Medicare taxes. See note 1, *supra*. Before Congress enacted TEFRA, service by federal judges was excluded from the Social Security Act's definition of "employment" by 42 U.S.C. 410(a)(6)(A) (1976), which excluded service by federal employees such as Article III judges who were covered by another retirement system established by federal law. That service, therefore, could not be counted towards eligibility for old-age or Medicare benefits. In TEFRA, Congress kept judges outside the OASDI system but brought them within the Medicare system by establishing a special category of "Medicare Qualified Federal Employment," such that service would count towards Medicare eligibility, but not old-age benefit eligibility. That category included service by Article III judges. See 42 U.S.C. 410(p)(2) (1982); 96 Stat. 560. In the Social Security Amendments of 1983, Congress excluded federal judges from the exclusion of employment for OASDI purposes. 97 Stat. 68; see 42 U.S.C. 410(a)(5)(E). The 1983 Act thereby made federal judges' service countable for old-age benefits and, by operation of 42 U.S.C. 426, Medicare benefits also.

judges, and all new executive and legislative branch employees, as well as any current employees not participating in CSRS. Those employees remain subject to Medicare and OASDI taxes today. See 26 U.S.C. 3121(b)(5).

Congress brought federal employees, including federal judges, within the Medicare and Social Security systems in part out of concern that those employees were not paying a fair share of the cost of financing the benefit programs. When Congress in 1982 enacted legislation to bring federal employees within the Medicare system,[3] the Senate Finance Committee noted as follows:

> Many active Federal civilian employees have worked long enough (or their spouses have) in employment covered by social security to become insured under the Hospital Insurance program. However, while most workers in covered social security employment are subject to the Hospital Insurance tax throughout their entire working careers, Federal employees may earn the same coverage with relatively fewer years of work subject to the tax. The committee believes that Federal workers should bear a more equitable share of the costs of financing the benefits to which many of them eventually become entitled.
>
> The bill, therefore, extends Medicare coverage to all members of the Federal workforce in the same way coverage is provided to most other workers.

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[3] See Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, Tit. II, Subtit. E, Pt. III, § 278, 96 Stat. 559-563 (discussed at note 1, *supra*).

S. Rep. No. 494, 97th Cong., 2d Sess. 378 (1982). Similarly, when Congress in 1983 enacted legislation to bring federal employees (including federal judges) within the Social Security old-age benefit system,[4] the House Ways and Means Committee observed that the expansion of coverage to include "several groups of workers previously excluded from participation in the program" was intended to "maintain the social security program on a sound financial basis" and to "assur[e] both the short and long-term financial stability of the program." H.R. Rep. No. 25, 98th Cong., 1st Sess. 3 (1983).

2. Respondents filed suit in the United States Claims Court (now the Court of Federal Claims), seeking a refund of the Medicare and OASDI taxes imposed on their salaries. All respondents were already serving as federal judges when the extension of those taxes to federal employees' salaries took effect. They contended that the application of those taxes to their salaries violated the Judges' Compensation Clause of Article III, Section 1, of the Constitution, which provides that "[t]he Judges, both of the supreme and inferior Courts * * * shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." They relied in part on *Evans* v. *Gore*, 253 U.S. 245 (1920), in which this Court held (over the dissent of Justices Holmes and Brandeis) that the application of the federal income tax to the salary of a federal judge who was already in office when the tax was enacted violated the Judges' Compensation Clause.

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[4] See Social Security Amendments of 1983, Pub. L. No. 98-21, § 101, 97 Stat. 67-70.

The Claims Court initially concluded that it lacked jurisdiction over the suit because respondents had not filed prerequisite administrative claims for tax refunds with the Internal Revenue Service. App., *infra*, 48a-54a. The court of appeals reversed, however, and concluded that the Claims Court had jurisdiction over the case under the Tucker Act, 28 U.S.C. 1491(a)(1). App., *infra*, 38a-47a. The court of appeals concluded that, although respondents "could have pursued a tax refund," which would have required a prior administrative claim, they instead sought damages for a violation of the Judges' Compensation Clause. *Id.* at 45a. The court of appeals believed that respondents were entitled "to pursue their claim on any viable legal theory," and that "[c]onditioning redress of an alleged compensation clause breach on executive branch actions would frustrate the purpose of Article III, § 1." *Ibid.*

3. On remand, the Court of Federal Claims upheld the application of the taxes to judges' salaries, and accordingly granted summary judgment to the government and denied summary judgment to respondents. App., *infra*, 14a-37a. The court first reviewed (*id.* at 16a-18a) the holdings in *Evans* v. *Gore* and *Miles* v. *Graham*, 268 U.S. 501 (1925), which relied on *Evans* to hold that Congress could not constitutionally tax the salary of any Article III judge, even one who assumed office after the enactment of the challenged income tax. It then considered (App., *infra*, 18a-19a) the significance of this Court's decision in *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), in which this Court upheld application of the income tax to the salary of a federal judge, and stated that a "nondiscriminatory tax laid generally on net income is not * * * a diminution [of a federal judge's] salary within

the prohibition" of the Clause, *id.* at 282. The court concluded that "*O'Malley* left *Miles* effectively overruled," and that "*O'Malley* remains the most important precedent in the area of taxation of federal judges." App., *infra*, 18a-19a.

The court also considered the en banc decision of the Court of Claims in *Atkins* v. *United States*, 556 F.2d 1028 (1977), cert. denied, 434 U.S. 1009 (1978), in which that court rejected the contention of federal judges that inflation had effectively diminished their compensation, in violation of the Constitution.[5] The court noted that *Atkins* had stated that both *Evans* and *Miles* are "'no longer good law,'" and that *O'Malley* had "'overruled *Miles*, and by force of reasoning overruled a good deal of *Evans*.'" App., *infra*, 20a (quoting *Atkins*, 556 F.2d at 1043, 1044). It summarized *Atkins* as holding that the Judges' Compensation Clause prohibits any "direct diminution" of a judge's salary, such as a reduction in the number of dollars in the statutory salary, but that it does not prohibit an "indirect reduction," such as a new tax that "lowers the take-home pay of a judge but not the statutory salary"—at least absent any indication that the indirect reduction discriminated against federal judges. App., *infra*, 20a, 22a.

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[5] The Court of Claims was abolished in 1982, and its jurisdiction was transferred to the Court of Appeals for the Federal Circuit, which has appellate jurisdiction over decisions of the Court of Federal Claims, a trial-level court (previously called the United States Claims Court). Decisions of the Court of Claims are binding precedent in the Court of Appeals for the Federal Circuit and the Court of Federal Claims. See *South Corp.* v. *United States*, 690 F.2d 1368 (Fed. Cir. 1982); App., *infra*, 19a n.5.

Based on that summary, the court concluded that the taxes at issue in this case are valid. Although it acknowledged that this Court has never expressly overruled *Evans*, it declined to rely on that decision in light of *O'Malley* and *Atkins*, and it therefore concluded that the taxes are not invalid "direct diminutions" of respondents' salaries. App., *infra*, 24a-27a. It also rejected the contention that the new taxes discriminate against judges, and are therefore invalid "indirect diminutions" of their compensation.[6] The court concluded that "the central Compensation Clause taxation rule has not been violated: judges are being treated no worse than other federal employees and citizens." *Id.* at 34a.

4. The court of appeals reversed, and held that Congress's extension of the Medicare and OASDI taxes to the salaries of already commissioned federal judges violated the Judges' Compensation Clause. App., *infra*, 1a-13a. Framing the issue as "whether imposition of new taxes on judges after they have taken office unconstitutionally diminishes their compensation," the court concluded that this Court "addressed this very issue in *Evans*," which "controls this case." *Id.* at 5a-6a. "Federal law did not charge [respondents] with the duty of paying Social Security taxes when they first assumed office. Subsequent

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[6] With respect to the latter point, the court rejected respondents' argument that Congress can place generally applicable taxes on judges' salaries only at the time that it also levies those taxes on the public at large. App., *infra*, 27a-29a. It also rejected the argument that the new taxes discriminated between federal judges and other federal employees who had previously been covered by CSRS and who were permitted to offset their contributions to CSRS by the new amount of their Social Security taxes. *Id.* at 32a-34a.

imposition of the taxes reduced [their] salaries, as in *Evans*." *Id.* at 6a.

The court distinguished *O'Malley* as holding only that "newly appointed Article III judges must continue to pay income taxes just as they had prior to appointment." App., *infra*, 6a. As the court read that case, "[b]ecause the claimants in *O'Malley* took office after Congress had made income taxes applicable to judges' salaries, those judicial claimants suffered no diminishment in compensation after taking office. The tax was a pre-existing obligation factored into the new judges' compensation." *Id.* at 7a. The court acknowledged that *O'Malley* had "undermined the reasoning of *Evans*," but it stressed that *Evans* had never been expressly overruled by this Court. *Ibid.* It therefore concluded that it was obliged to follow *Evans*, and should "'leav[e] to this Court the prerogative of overruling its own decisions.'" *Id.* at 7a-8a (quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

The court of appeals also rejected the trial court's reliance on *Atkins* to draw a distinction between direct diminutions in judges' compensation and indirect ones, in the form of taxation. "'Compensation,'" it stated, "embraces all forms of remuneration, not merely salary. 'Diminished' embraces all means of decreasing, regardless of the intent or target of the reduction." App., *infra*, 8a. "Thus," the court held, "the Constitution protects judicial compensation against all forms of diminishment," *ibid.*, even diminishment in the form of the incidence of a generally applicable income tax.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case held unconstitutional, as applied to all federal judges appointed before 1983, the Acts of Congress that extended the Medicare and Social Security taxes to the salaries of federal employees. In reaching that conclusion, the court followed this Court's decision in *Evans* v. *Gore*, 253 U.S. 245 (1920), even though it recognized that subsequent decisions of this Court, including *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), had "undermined the reasoning of *Evans*." App., *infra*, 7a. The court believed that it should "leav[e] to this Court the prerogative of overruling its own decisions." *Id.* at 7a-8a (quoting *Rodriguez de Quijas* v. *Shearson/American Express Co.*, 490 U.S. 477, 484 (1989)). A court of appeals decision invalidating federal legislation on that basis clearly warrants this Court's review.

In addition, the issues in this case have significance well beyond the constitutionality of the imposition of Social Security taxes on the salaries of sitting judges. Under the court of appeals' reasoning, Congress would also be prohibited from applying any increase in the *rate* of any tax, including the income tax, to sitting judges' salaries. That result would create serious practical difficulties in tax administration and would undermine Congress's goal of treating Article III judges as the equal of all other citizens in liability for federal taxes.

Although no other court of appeals has considered the precise issue presented, the Federal Circuit is a court of nationwide jurisdiction.[7] Taxpayers are

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[7] Other courts of appeals have, however, followed the test of *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), cert.

entitled to pay a challenged tax and sue for a refund in the Court of Federal Claims, and the Federal Circuit has held that the Court of Federal Claims has jurisdiction over respondents' complaint under the Tucker Act, 28 U.S.C. 1491(a)(1). See App., *infra*, 47a. Accordingly, any federal judge who wishes to challenge the application of a tax to his or her salary can sue in the Court of Federal Claims and gain the benefit of the court of appeals' decision in this case. Absent review by this Court, the decision of the Federal Circuit is therefore the effective law of the land. In similar circumstances, this Court has granted review of Federal Circuit decisions presenting issues of substantial and recurring importance. See, *e.g.*,

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denied, 434 U.S. 1009 (1978), that was rejected by the court of appeals in this case (App., *infra*, 8a): "Indirect, nondiscriminatory diminishments of judicial compensation, those which do not amount to an assault upon the independence of the third branch or any of its members, fall outside the protection of the Compensation Clause." 556 F.2d at 1045. In *Robinson* v. *Sullivan*, 905 F.2d 1199, 1202 (1990), the Eighth Circuit relied on *Atkins* to conclude that Congress's retroactive rescission of Social Security coverage for the employment of senior federal judges (which was in effect for one quarter) did not violate the Clause. In *Duplantier* v. *United States*, 606 F.2d 654, 669 (1979), cert. denied, 449 U.S. 1076 (1981), the Fifth Circuit relied on *Atkins* to conclude that the penalty provisions for violations of the disclosure requirements imposed on judges and other senior government employees by the Ethics in Government Act do not violate the Clause, even though they "may reduce a judge's disposable income." Most recently, in *Jefferson County* v. *Acker*, 61 F.3d 848 (1995), vacated for reh'g en banc, 73 F.3d 1066 (1996), a panel of the Eleventh Circuit concluded that a county occupation tax that was in the nature of an income tax, which was applied to all persons engaged in an occupation including federal judges, also did not violate the Clause as construed in *Atkins*.

United States v. *Hill*, 113 S. Ct. 941, 945 (1993); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986).

1. The Federal Circuit concluded that *Evans* controls this case. In *Evans*, the Court held that the Judges' Compensation Clause barred the application of the income tax to federal judges' salaries. *Evans* involved a tax levied under a 1919 statute on the salary of a federal judge appointed in 1899 (see 253 U.S. at 246), but the opinion did not limit the holding to situations where the judge's appointment predates the imposition of the tax. Rather, the majority relied (*id.* at 255) on intergovernmental tax immunity cases such as *Collector* v. *Day*, 78 (11 Wall.) 113 (1871), and *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), for the broad proposition that the Framers "were so sedulously bent on securing the independence of the judiciary [that they] intended to protect the compensation of judges from assault and diminution in the name and form of a tax[.]" 253 U.S. at 256. The Court concluded that the judge's "compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support." *Id.* at 263.

Justice Holmes, joined by Justice Brandeis, dissented and stated that the imposition of an income tax upon judges is constitutional as long as it does not single out judicial compensation but, rather, applies with like force to all citizens. Justice Holmes argued that the constitutional imperative of protecting judicial independence "is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others." 253 U.S. at 265. "To require a man to pay

the taxes that all other men have to pay," he continued, "cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends." *Ibid.*

In *Miles* v. *Graham*, 268 U.S. 501 (1925), the Court relied on *Evans* to hold that the Compensation Clause barred the imposition of income tax on the salary of a judge appointed after the enactment of the tax (see *id.* at 505). The Court concluded that the compensation was fixed by statute, "and to exact a tax in respect of this would diminish it within the plain rule of *Evans* v. *Gore*." *Id.* at 509. In essence, the Court held that federal judges' salaries must be free of all taxes.

Fourteen years later, the Court abandoned "the plain rule of *Evans* v. *Gore*" and embraced the Holmes-Brandeis view that judicial salaries are as subject to taxation as the salaries of other citizens. In *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), the Court, considering another attempt by Congress to require judges to pay income tax, held that "a nondiscriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition" of the Constitution. *Id.* at 282. To subject judges to a general tax "is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *Ibid.*

O'Malley expressly overruled *Miles*. 307 U.S. at 282-283. It did not expressly overrule the holding of *Evans*, for Congress had structured the income tax act under review "to avoid, at least in part, the consequences of" that decision, by making the tax applicable only to the salaries of judges appointed after its effective date. See *id.* at 279-280. The Court did disapprove the reasoning of that decision, however:

> [T]he meaning which *Evans* v. *Gore* imputed to the history which explains Article III, § 1, was contrary to the way in which it was read by other English-speaking courts. The decision met wide and steadily growing disfavor from legal scholarship and professional opinion. *Evans* v. *Gore* itself was rejected by most of the courts before whom the matter came after that decision.

307 U.S. at 281 (footnotes omitted).[8]

The Court considered the significance of *O'Malley*, *Miles*, and *Evans* in *United States* v. *Will*, 449 U.S. 200 (1980). In that case, federal judges challenged the repeal by Congress of legislated increases in judicial salaries four years in a row. Two of the annual increases were revoked by Congress before they became effective, but two were cancelled after their effective dates. The Court held that Congress may not withdraw an increase in gross judicial salary once it has gone into effect, but that Congress may cancel a prospective statutory salary increase before it takes effect. With respect to the latter situation, the

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[8] Justice Butler's dissent in *O'Malley* also noted that, "[e]vidently, the Court intends to destroy the decision in *Evans* v. *Gore*. Without suggesting that there is any distinction between that case and *Miles* v. *Graham*, it declares that the latter " 'cannot survive.' " 307 U.S. at 297.

Court disapproved the district court's reliance on *Evans* v. *Gore* as a basis for holding that the rescission of the salary increase before its effective date reduces the amount of compensation that a judge has been promised. 449 U.S. at 200. Rather, the Court stated:

> In *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), this Court held that the immunity in the Compensation Clause would not extend to exempting judges from paying taxes, a duty shared by all citizens. The Court thus recognized that the Compensation Clause does not forbid everything that might adversely affect judges. The opinion concluded by saying that to the extent *Miles* v. *Graham*, 268 U.S. 501 (1925), was inconsistent, it "cannot survive." 307 U.S. at 282-283. *Because Miles relied on Evans v. Gore, O'Malley must also be read to undermine the reasoning of Evans.*

449 U.S. at 227 n.31 (emphasis added).

2. Despite this Court's disapproval of the reasoning in *Evans* in both *O'Malley* and *Will*, the court of appeals concluded that *Evans* was still the controlling decision with regard to the facts of the present case, in which respondents are challenging a tax that was first imposed on judicial salaries after they took office. It attempted to reconcile *Evans* and *O'Malley* by holding that, under *Evans*, Congress may not impose *new* taxes on the salaries of already sitting federal judges (even if those taxes do not discriminate against judges), while under *O'Malley*, "nondiscriminatory taxation of a judge *who took office after the tax went into effect* does not violate the Compensation Clause." App., *infra*, 11a. The

court's reasoning was that, in the former case, the already sitting judge's compensation is "diminished" by the effect of the new tax, while in the latter case, "the taxation formed part of that judge's compensation scheme from the outset of his tenure." *Ibid.*

The interpretation of the Judges' Compensation Clause reflected in the court of appeals' opinion is erroneous: that Clause does not bar Congress from imposing new, nondiscriminatory taxes on the salaries of already sitting federal judges. Because the court of appeals believed that its decision was compelled by the precedential force of *Evans*, this Court should grant review to overrule *Evans* definitively. The Court should also make clear that the imposition of a nondiscriminatory tax on the salary of a federal judge does not "diminish" that judge's "compensation," whether the tax was enacted before or after the judge took office.

Evans relied on a constitutional theory that has since been disapproved. The Court relied on its intergovernmental tax immunity decisions, as well its observation in several cases that "the power to tax carried with it 'the power to embarrass and destroy,'" to conclude that the Framers must have intended "to protect the compensation of the judges from assault and diminution in the name or form of a tax." 253 U.S. at 255-256. In effect, the Court concluded in *Evans* that judges' salaries must be absolutely immune from congressional taxation.

The rationale of *Evans* has not survived closer scrutiny over time. The intergovernmental immunity cases on which it relied for support by analogy have been "thoroughly repudiated." *South Carolina* v. *Baker*, 485 U.S. 505, 520, 524 (1988) (overruling *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429

(1895)); see *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Collector* v. *Day*, 78 (11 Wall.) 113 (1871)). In particular, in *Graves*, decided the same Term as *O'Malley*, the Court noted that the purpose of intergovernmental tax immunity is "not to confer benefits on [governmental] employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy * * * but to prevent undue interference with one government by imposing on it the tax burdens of the other." 306 U.S. at 483-484. The Court held there that a nondiscriminatory state income tax that falls on federal employees as well as others does not "impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions." *Id.* at 480-481.

This Court's more recent decisions on the Judges' Compensation Clause do not support the view that the application of a nondiscriminatory tax to judges' salaries violates that Clause by "diminishing" the judges' compensation, even in the case of judges appointed before the tax took effect. As the Court explained in *Will*, the purpose of the Clause is to secure "a truly independent judiciary, free of improper influences from other forces within government." 449 U.S. at 218. Subjecting judges' salaries to generally applicable taxes poses no threat to the constitutional value protected by the Clause. Rather, it acknowledges that "judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *O'Malley*, 307 U.S. at 282 (footnote omitted); see also

Will, 449 U.S. at 226 ("Federal judges, like all citizens, must share 'the material burden of the government.'"). That is true whether Congress imposes an entirely new tax on the income of all citizens, including federal judges, or (as in this case) brings federal judges' salaries within the coverage of a tax that has long been applied to the vast majority of the paid labor force.[9]

The Framers' objective was to preclude "a plan fashioned by the political branches * * * ineluctably operating to punish the judges *qua* judges, or to drive them from office despite the Constitution's guarantee of tenure in office 'during good Behaviour.'" *Atkins*, 556 F.2d at 1054. But, as Justice Holmes observed in *Evans* (253 U.S. at 265), the need to protect judges from improper political influences does not require or justify providing them with a perpetual immunity from the burdens of citizenship that all other citizens must bear. The trial court in this case correctly summarized the purpose of the Clause when it explained:

> [T]he purpose of the Compensation Clause is not to make irrevocable every momentary tax exemption enjoyed by sitting judges relative to the public; its purpose is rather to protect the independence of the judicial branch by insuring that

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[9] In *Will*, the Court held that a direct reduction in the statutory salary of federal judges violated the Clause, even though the reduction also affected salaries of employees in the Legislative and Executive Branches and was therefore arguably "nondiscriminatory." 449 U.S. at 226. The Court distinguished the case of taxation, and cited with approval *O'Malley*'s holding that the Clause "was not offended by an income tax levied on Article III judges as well as on all other taxpayers." *Ibid.*

> judges are shielded from attempts by the political branches to impose economic duress. This underlying purpose leads to the simple rule of thumb which governs this case: in general, if judges are treated like other citizens by the tax laws, no threat to judicial independence arises, and so the Compensation Clause is not implicated. Congress always has the power to place judges in tax parity with other citizens.

App., *infra*, 29a (citations omitted).

Congress's imposition of Social Security and Medicare taxes on the salaries of sitting federal judges cannot conceivably be considered a "financially based attack on judicial independence" (*Atkins*, 556 F.2d at 1054). Nothing in the circumstances surrounding Congress's extension of those taxes to federal judges suggests that Congress's purpose was to undermine the independence federal judges, or that the taxes could reasonably be perceived as having that purpose or effect. Indeed, Congress has almost doubled federal judicial salaries since 1983. See C.A. App. A139. Rather, Congress ensured that judges are treated, for purposes of the Social Security and Medicare programs, in the same way as the 90% of the paid civilian labor force that pays Social Security taxes and accrues eligibility for Social Security and Medicare benefits after retirement.

3. The court of appeals' decision also warrants review because the logic of its ruling is not confined to the incidence of the imposition of a *new* tax on judges' incomes. If, as the court of appeals believed, "'[d]iminished' embraces all means of decreasing, regardless of the intent or target of the reduction" (App., *infra*, 8a), then sitting judges' salaries pre-

sumably are "diminished" whenever Congress raises the *rate* of a generally applicable income tax. Accordingly, the Judges' Compensation Clause would be violated if, for example, Congress raised federal income tax rates or raised the Social Security tax rate imposed generally on employees' wages. Indeed, if, as respondents suggest, judges' "compensation," within the meaning of the Clause, is actually their salary after taxes, then the Clause would be violated if Congress reduced or eliminated deductions and credits that federal judges, like all other citizens, could use to reduce the amount of their income tax.

Such an interpretation of the Clause would "trivialize the great historic experience on which the framers based the safeguards of Article III, § 1." *O'Malley*, 307 U.S. at 282. It would also create considerable practical difficulties in tax administration. Congress would have to freeze the income tax rate, deductions, and credits applicable to every federal judge (insofar as the tax fell on the judge's salary) at the moment that each judge took office. That requirement would also create serious inequities among Article III judges. Alternatively, Congress could impose on all federal judges the lowest income tax rate that was applicable when any sitting member of the federal judiciary first took office; but that approach would also be quite difficult to administer, and would result in serious inequities between Article III judges and all other citizens.[10] Congress

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[10] Assume, for example, that the marginal income tax rate applicable to federal judges' salaries was 25% before 1985, was raised to 30% in 1985, and was raised to 35% in 1990. Under the first alternative described in the text, judges would be subject to different income tax rates depending on their dates of appointment. Under the second alternative, the marginal

would be limited to the same alternatives for the Social Security tax.[11] Both results are at odds with the Court's admonitions that "judges are also citizens," and that the Clause does not give judges "an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *Ibid.*[12]

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income tax on the salary of all federal judges could not be raised above 25%, even though all other citizens in the same income tax bracket would now be taxed at the 35% marginal tax rate.

[11] Congress could, of course, eliminate the service of federal judges from the Social Security and Medicare programs.

[12] There is a threshold question whether some of the members of this Court are disqualified from hearing and deciding this case. As of January 1, 1983, when the Medicare tax on judicial salaries first took effect, three Justices were already serving on this Court, and four Justices were already serving on the federal courts of appeals. If those Justices were eligible to receive refunds of the taxes challenged in this case, they arguably would have "a financial interest in the subject matter in controversy" that would require disqualification under 28 U.S.C. 455(b)(4). It appears, however, that the statute of limitations has run for any such claim by a Justice who has not already filed a complaint or claim for a tax refund. Assuming that the applicable statute of limitations is 28 U.S.C. 2401(a), the general statute of limitations for civil actions against the United States, such an action is barred unless a complaint was filed "within six years after the right of action first accrues." This case was not brought as a class action. Therefore, any claim based on the effect of Medicare and OASDI taxes before April 24, 1990—six years before the filing date of this petition—has expired. (In fact, we believe that the applicable statute of limitations is the less generous provision in 26 U.S.C. 6511(a), which requires that a tax refund claim be filed "within 3 years from the time the return is filed or 2 years from the time the tax was paid, whichever of such periods expires the later.")

With respect to the possibility of claims accruing after April 24, 1990, the substantial increase in judicial salaries between the imposition of the taxes challenged in this case and that date would appear to preclude such claims. From December 17, 1982, to December 31, 1983, circuit judges were paid an annual salary of $77,300, and Associate Justices an annual salary of $93,000. That is the compensation that was purportedly "diminished" when Medicare and OASDI taxes first became applicable to judicial salaries. As of January 31, 1990, circuit judges received an annual salary of $102,500, Associate Justices a salary of $118,600, and the Chief Justice a salary of $124,000. See C.A. App. 139; Exec. Order No. 12,387, 47 Fed. Reg. 44,981 (1982); Exec. Order, No. 12,456, 49 Fed. Reg. 347 (1984); Exec. Order No. 12,698, 54 Fed. Reg. 53,473 (1989). As of January 31, 1990, the increases in judicial salaries, even after federal income, Medicare, and OASDI taxes, would appear to have offset any purported "diminution" in compensation caused by the imposition of Medicare and OASDI taxes in 1983 and 1984.

This case may also affect Congress's authority in the future to impose new taxes on judicial salaries, or to raise tax rates applicable to those salaries. In that sense, all the members of the Court arguably have a financial interest in the controversy, or perhaps some "other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. 455(b)(4); see also 28 U.S.C. 455(a) (requiring disqualification whenever a judge's or Justice's "impartiality might reasonably be questioned"). The same could be said, however, of every Article III judge. If, in consequence, the disqualification provisions of Section 455(b)(4) were implicated, no federal judge could decide this case. In such circumstances, the Rule of Necessity permits this Court to decide the constitutional issues presented by the petition. See *Will*, 449 U.S. at 217.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1996

APPENDIX A

UNITED STATES COURT OF APPEALS FOR FEDERAL CIRCUIT

No. 94-5139

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A. J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER, AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFFS-APPELLANTS,

v.

THE UNITED STATES, DEFENDANT-APPELLEE

[Filed: Aug. 30, 1995]

Before: ARCHER, Chief Judge, PLAGER, and RADER, Circuit Judges.

RADER, Circuit Judge.

Sixteen federal judges challenged the withholding of Social Security taxes from their judicial salaries as a violation of the Compensation Clause of the United States Constitution, Article III, section 1. Accordingly, they sought a tax refund or recovery of their diminished compensation. The United States Court of Federal Claims granted the Government summary judgment. *Hatter v. United States*, 31 Fed.Cl. 436 (1994). Because the Compensation Clause forbids diminishments in the compensation of Article III judges after they have taken office, and because the trial court did not determine whether a diminution in fact occurred, this court reverses and remands.

BACKGROUND

Until 1983, judges appointed under Article III of the Constitution, like most federal employees, did not participate in the Social Security program. Most legislative and executive federal employees acquired a retirement annuity by contributing to the Civil Service Retirement System. 5 U.S.C. §§ 8331-51 (1994). After meeting age and service requirements, however, Article III judges receive a retirement annuity equal to their judicial salaries without making additional payments. 28 U.S.C. § 371(a) (1988 & Supp. V 1993).

In the early 1980s, Congress ordered withholding of certain components of the Social Security tax from the salaries of most federal employees, including Article III judges. Withholding of the Hospital Insurance portion began on January 1, 1983. Tax Equity and Fiscal Responsibility Act of 1982, Pub.L.

No. 97-248, § 278(a), 96 Stat. 324, 559, 562 (codified as amended at 26 U.S.C. § 3121(u) (1988)). Withholding of the Old Age and Survivors Disability Insurance portion began on January 1, 1984. Social Security Amendments of 1983, Pub.L. No. 98-21, § 101(a)(1), (b)(1) & (d), 97 Stat. 65, 67-70 (codified as amended at 26 U.S.C. § 3121(b)(5)(E) (1988 & Supp. V 1993) and 42 U.S.C. § 410(a)(5)(E) (1988 & Supp. V 1993)).

Sixteen Article III judges—all appointed before January 1, 1983—sued in the Court of Federal Claims for a refund of these Social Security taxes or recovery of their diminished compensation. The judges claimed that the taxation diminished their judicial compensation in violation of the Compensation Clause of the Constitution. The trial court granted the Government summary judgment that the Compensation Clause does not prohibit application of the tax to sitting Article III judges. *Hatter*, 31 Fed.Cl. at 445-47. The claimants appealed.

DISCUSSION

This court reviews a grant of summary judgment by the Court of Federal Claims *de novo*. *Cohen v. United States*, 995 F.2d 205, 207 (Fed.Cir. 1993).

I.

The Constitution's Compensation Clause states:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, *which shall not be diminished during their Continuance in Office.*

U.S. Const. art. III, § 1 (emphasis added). This constitutional language protects one of the most

remarkable innovations of the 1787 document: a judicial branch sufficiently independent to enforce constitutional limitations on all branches of Government. The Supreme Court acknowledged:

> The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.

United States v. Will, 449 U.S. 200, 217-18, 101 S.Ct. 471, 482, 66 L.Ed.2d 392 (1980). Alexander Hamilton, writing in *The Federalist* No. 79, explained the Framers' reasoning for this means of protecting the separation of powers: "In the general course of human nature, a power over a man's subsistence amounts to a power over his will." *The Federalist* No. 79, at 472 (Clinton Rossiter ed., 1961) (emphasis omitted).

To provide a judiciary with sufficient independence to protect constitutional rights against any incursion, the Framers adopted an unrestricted protection for judicial compensation. Judicial independence, Alexander Hamilton prophetically noted, would prove "the citadel of the public justice and the public security." *The Federalist* No. 78, at 466 (Clinton Rossiter ed., 1961). Thus, as the Supreme Court concluded:

> [T]he prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the main-

> tenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

Evans v. Gore, 253 U.S. 245, 253, 40 S.Ct. 550, 553, 64 L.Ed. 887 (1920). For these reasons, the Constitution's language broadly prohibits any diminution in judicial compensation during a judge's continuance in office.

II.

This case raises the question whether imposition of new taxes on judges after they have taken office unconstitutionally diminishes their compensation. The Supreme Court addressed this very issue in *Evans*. In *Evans*, the Court held that the Compensation Clause prohibited imposition of the newly enacted income tax on sitting judges. Examining the broad constitutional protection for judicial independence, the Court wrote:

> The prohibition is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption . . . make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise,—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries.

Id. at 255, 40 S.Ct. at 553; *see also id.* at 249-52, 40 S.Ct. at 553.

When the judges in *Evans* first assumed office, Congress had not charged them with the duty of paying income taxes. Thus, the imposition of these taxes on their salaries acted as a reduction in their salary. As the Court observed:

> Here the Constitution expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation or otherwise .... [T]he compensation suffers a diminution to the extent that it is taxed.

Id. at 264. The Court therefore invalidated application of the income tax to judges who had taken office prior to the tax.

Evans controls this case. The claimants here are Article III judges who took office prior to imposition of the Social Security taxes in question. Federal law did not charge the claimants with the duty of paying Social Security taxes when they first assumed office. Subsequent imposition of the taxes reduced the claimants' salaries, as in *Evans*.

The subsequent Supreme Court case of *O'Malley v. Woodrough*, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289 (1939), does not affect this analysis. In that case, the Court held that newly appointed Article III judges must continue to pay income taxes just as they had prior to appointment:

To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the govern-ment whose Constitution and laws they are charged with administering. *Id.* at 282, 59 S.Ct. at 840.

Because the claimants in *O'Malley* took office after Congress had made income taxes applicable to judges' salaries, those judicial claimants suffered no diminishment in compensation after taking office. The tax was a pre-existing obligation factored into the new judges' compensation. On this basis *O'Malley* is distinguishable from *Evans* and the facts of this case. In *Evans* and this case, the claimants were already judges when the Social Security taxes took effect. The taxes therefore affected the claimants' established compensation. Thus, Congress's imposition of the Social Security tax on the claimants triggered scrutiny under the Compensation Clause.

The Supreme Court has stated that *O'Malley* "undermined the reasoning of *Evans*." *United States v. Will*, 449 U.S. 200, 227 n. 31, 101 S.Ct. 471, 487 n. 31, 66 L.Ed.2d 392 (1980). This court's predecessor has made the same point. *See Atkins v. United States*, 556 F.2d 1028, 1044, 214 Ct.Cl. 186 (1977) (en banc), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978). Neither of these pronouncements, however, are sufficient to overrule *Evans*. Had changes in judicial doctrine in fact "removed or weakened the conceptual underpinnings" of *Evans*, the Court itself would have overruled the case. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 109 S.Ct. 2363, 2370-71, 105 L.Ed.2d 132 (1989). It has not done so. Further, as the Supreme Court recently stated:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly

> controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989). Again, the Supreme Court has never overruled *Evans*. *Evans* governs this case more directly than *O'Malley*.

The trial court erred by upholding the imposition of Social Security taxes on the claimants on the grounds that such taxation was both "generally applicable" and "non-discriminatory." *See O'Malley*, 307 U.S. at 282, 59 S.Ct. at 840; *see also Atkins*, 556 F.2d at 1045. The trial court holding thus interprets the Constitution's Compensation Clause to forbid only discriminatory taxes which single out the federal judiciary. In other words, the trial court in effect read the term "compensation" as synonymous with "salary," and "diminished" as synonymous with "intentionally reduced." This reading limited the protections for judicial independence to discriminatory attacks on the judiciary in the form of direct reductions in salary.

The words of the Constitution are not so limited, nor are its protections for judicial independence. "Compensation" embraces all forms of remuneration, not merely salary. "Diminished" embraces all means of decreasing, regardless of the intent or target of the reduction. Thus, the Constitution protects judicial compensation against all forms of diminishment.

The Constitution's enactment history supports this reading of the Compensation Clause. On June 13, 1787, the Constitutional Convention's Committee of the Whole drafted a resolution prohibiting Congress from either increasing or decreasing the compen-

sation of judges. Clinton Rossiter, *1787: The Grand Convention* 365 (1966). Gouveneur Morris opposed the prohibition on increases, as he believed that Congress should have the power to augment judicial compensation "as circumstances might require" to avoid "any improper dependence in the judges." 2 Max Farrand, *Records of the Federal Convention of 1787* at 44 (1911). Benjamin Franklin agreed and specified two circumstances—increases in workload and inflation of the currency—which would justify an increase. *Id.* at 44-45.

James Madison favored retaining the ban on increases in compensation. He feared that judges might unduly defer to Congress during legislative consideration of pay raises. *Id.* at 45. In other words, the Convention was unanimous on the overriding concern of protecting the judicial branch against meddling with its compensation. Further, the Convention voiced grave concerns about potential compromises in judicial independence if judges faced the prospect of seeking legislative redress of compensation concerns. In sum, the Convention perceived only mischief in the prospect of judges approaching the legislative branch to seek proper compensation. Ultimately, on a vote of 6-2, with one state absent, the Convention permitted increases and forbade all decreases in judicial compensation. *Id.* at 45.

Alexander Hamilton later explained this result:

> It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today might in half a century become

> penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual [judge] for the worse.

The Federalist No. 79, at 473 (Alexander Hamilton) (Clinton Rossiter ed., 1961). According to Hamilton, the Compensation Clause's term "diminished" forbids any action which changes the "condition of the individual [judge] for the worse." *Id.*

James Madison concurred in Hamilton's analysis and extended the coverage of the term "compensation" to all "emoluments" of the judicial office:

> [M]embers of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be nominal.

The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961). In sum, the Convention considered judicial independence a core value of the Constitution and adopted a broad protection for it. *See Will*, 449 U.S. at 217-21, 101 S.Ct. at 481-84; *Evans*, 253 U.S. at 252-55, 40 S.Ct. at 552-54.

The text and history of the Compensation Clause do not support the test applied by the trial court. The Supreme Court itself suggested as much in *Will* where, in considering Congress's rescission of judicial pay raises, the Court stated: "the Constitution makes no exceptions for 'nondiscriminatory' reductions." *Will*, 449 U.S. at 226, 101 S.Ct. at 486.

The Government's attempt to limit this statement in *Will* to 'direct diminutions' is unpersuasive. *O'Malley*, distinguished by the *Will* Court as applying a nondiscrimination test, held that nondiscriminatory taxation of a judge *who took office after the tax went into effect* does not violate the Compensation Clause. In such circumstances, the taxation formed part of that judge's compensation scheme from the outset of his tenure. *See O'Malley*, 307 U.S. at 282, 59 S.Ct. at 838.

Nor does *Atkins* provide support for application of a nondiscrimination test to the taxes imposed in this case. In *Atkins*, the United States Court of Claims found that Congress' failure to raise judicial salaries during a period of high inflation was not an actionable diminution under the Compensation Clause, because the plaintiff judges could not show that Congress intended an attack on the judiciary's independence.

However appropriate it may be to consider whether inflation diminishes judicial compensation in a discriminatory fashion, as in *Atkins*, or applies taxes of general applicability to judges taking office after such taxes are effective, as in *O'Malley*, neither the Compensation Clause nor Supreme Court precedent supports applying a non-discrimination test to the imposition of a new tax, even though generally applicable, on sitting judges. As indicated above, the controlling Supreme Court precedent, *Evans*, instructs otherwise. *Evans*, 253 U.S. at 254-55, 40 S.Ct. at 553-54. Under *Evans*, only judges who took office prior to the imposition of the new Social Security taxes suffered a diminution.

III.

The trial court did not determine whether the Social Security taxes in this case in fact diminished the claimants' compensation. Although noting that inclusion in Social Security might not result in an overall reduction of compensation, *Hatter*, 31 Fed.Cl. at 441 n. 9, the trial court assumed a reduction, noting the decrease at least in take-home pay, for the purpose of resolving the summary judgment motions before it and proceeding to the constitutional issue.

As noted, the term "compensation" extends beyond mere salary, and includes all forms of remuneration attached to the judicial office. Therefore, the claimants' new Social Security retirement benefits, if any, are part of their compensation. These future benefits, however, are not vested in any manner. They thus do not give the claimants a certain entitlement to any offsetting sum. In addition, innumerable individual scenarios could eliminate a claimant's potential Social Security benefit, or greatly reduce the amount of the potential benefit. Because of all the variables that would have to be taken into account in arriving at even a rough estimate of a current discounted value for Social Security benefits that might be payable in the future, it is impossible accurately to weigh these benefits against the taxes withheld from the claimants.

It is certain, however, that the Social Security taxes diminished the claimants' salaries by specific amounts. The reduction was concrete, while the potential future benefit is entirely speculative. A speculative, incalculable future benefit cannot offset a

concrete, present reduction.* The Social Security taxes therefore diminished the claimants' compensation in violation of the Compensation Clause.

CONCLUSION

Social Security taxes diminish the compensation of Article III judges who took office prior to enactment of the taxes. This court therefore reverses and remands the case for tax refunds or recoveries for the sums improperly withheld from the claimants' salaries.

COSTS

Each party shall bear its own costs.

REVERSED and REMANDED.

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* If the future benefits were calculable and marketable, however, an unconstitutional diminution in compensation would occur when a present reduction exceeded the present value of the future benefits minus reasonable transaction costs in marketing them.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 705-89 C

JUDGE TERRY J. HATTER, JR., ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 22, 1994]

OPINION AND ORDER

TURNER, Judge.

This opinion addresses plaintiffs' motion for summary judgment filed September 2, 1993 and defendant's cross-motion for summary judgment filed October 1, 1993. Oral argument was heard on November 16, 1993. The parties agree that there are no material disputed facts. We conclude that defendant's cross-motion should be granted.

I

Plaintiffs are federal district and circuit court judges who took office prior to January 1, 1983. On that date, all federal judges for the first time became subject to the Hospital Insurance (Medicare) portion of the Social Security tax. Tax Equity and Fiscal Responsibility Act, Pub.L. No. 97-248, § 278(a) 96 Stat. 324, 559 (1982) (codified as amended at 26 U.S.C. (I.R.C.) § 3121(u) (1988)). One year later, judges

became subject to the Old Age Survivors and Disability Insurance portion of the Social Security tax, and since January 1, 1984, all federal judges have been fully subject to Social Security taxes. Social Security Amendments of 1983, Pub.L. No. 98-21, § 101(a)(1), (b)(1) and (d), 97 Stat. 65, 68, 69 (codified as amended at 26 U.S.C. (I.R.C.) § 3121(b)(5)(E) (1988) and 42 U.S.C. § 410(a)(5)(E) (1988)). Social Security taxes have therefore been duly withheld from plaintiffs' monthly compensation since the effective dates of these acts.

Plaintiffs all serve pursuant to Article III of the Constitution, which in pertinent part provides that federal judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1 (hereafter the "Compensation Clause").

Plaintiffs contend that because they were already judges when the withholding of Social Security taxes from their pay began, their compensation was diminished in violation of the Compensation Clause. In the alternative, plaintiffs claim a contract right to undiminished compensation. Plaintiffs seek a refund of all Social Security taxes collected thus far.

After a review of Compensation Clause law in part II, we consider plaintiffs' four main constitutional arguments in part III, and then address plaintiffs' contract claim in part IV.

II

A

An income tax on judges was first imposed in 1862 and was collected for several years. Act of July 1, 1862, ch. 119, § 86, 12 Stat. 432, 472 (1862). This law

occasioned the Supreme Court's first pronouncement on the constitutionality of taxing judges. It came as an extraordinary 1863 protest against the tax issued in the form of a letter from Chief Justice Taney to the Treasury Secretary. This remarkable document, officially recorded and published by the Court[1] and resembling nothing so much as an unsolicited advisory opinion, was echoed several years later by an opinion from the Attorney General that the income tax was unconstitutional as applied to judges. 13 Op.A.G. 161 (1869). As a consequence, all taxes which had been collected on judicial compensation were refunded in 1873. *Wayne v. United States*, 26 Ct.Cl. 274, 290, 1800 WL 1765 (1891). But these two seemingly non-binding opinions had an even more powerful effect: the courts came to consider the matter of judicial taxation closed without ever actually addressing the issue. *E.g.*, *Wayne*, 26 Ct.Cl. at 290.

The courts finally addressed the matter when, subsequent to ratification of the 16th Amendment in 1913,[2] Congress in 1919 made its second serious attempt to tax federal judges. Revenue Act of 1918, ch. 18, § 213, 40 Stat. 1057, 1065 (1919). Thus the first Compensation Clause case of precedential significance does not appear until *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920). In *Evans*, a federal judge who had taken office in 1899 challenged

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[1] The letter is found at 157 U.S. 701. There was a 32-year lapse between the 1863 order of the Court recording the letter and its publication.

[2] "The Congress shall have power to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several states, and without regard to any census or enumeration." U.S. Const. amend. XVI (emphasis added).

the Revenue Act of 1918, arguing that the income tax was an unconstitutional diminution of his salary.

Over a vigorous dissent by Justice Holmes, joined by Justice Brandeis, the Court agreed with the plaintiff judge, holding that an income tax on judges was an impermissible diminution in compensation, and that the Compensation Clause continued to prohibit taxation of judicial salaries even after the 16th Amendment. Holmes's position in dissent, since adopted by the Court as will be seen, was that an income tax on judges would be valid so long as it did not single out judicial compensation but rather applied with like force to the income of all citizens. 253 U.S. at 264-67, 40 S.Ct. at 557-58.

The taxing authorities refused to give in so easily. In *Miles v. Graham*, 268 U.S. 501, 45 S.Ct. 601, 69 L.Ed. 1067 (1925), the government sought to limit the *Evans* rule, arguing that the tax protection of the Compensation Clause shielded only judges appointed before the tax became law (hereafter "prior judges").[3] According to the government, prior judges stood in contrast to judges taking office after the tax (hereafter "new judges"): taxation would not diminish the compensation of new judges, since they would never have received their salary untaxed. In *Miles*, the plaintiff was a new judge who argued, in essence, that the Compensation Clause's protection extended to judicial compensation as an entity or institution, without regard to whether the recipient judge took office before or after enactment of the tax.

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[3] Plaintiffs here are all prior judges, since they took office before the Social Security tax extended to the judiciary.

The Court in *Miles* agreed with the plaintiff, firmly rejecting the government's attempt to limit the *Evans* tax exemption to prior judges. (Brandeis, but not Holmes, dissented without comment.) Relying heavily on *Evans*, *Miles* made explicit the simple rule inferable from *Evans*: under the constitution, all judicial compensation provided for by Congress was tax-free. 268 U.S. at 509, 45 S.Ct. at 602.

In a familiar pattern, it was not long before the initially rejected Holmes-Brandeis formulation (calling for judicial salary to be treated the same for tax purposes as income earned by any citizen) was, in effect, adopted by the Court. This development came after Congress in 1932 made its third attempt to tax the judiciary, imposing another income tax limited to new judges. Revenue Act of 1932, ch. 209, § 22(a), 47 Stat. 169, 178 (1932). Predictably, a new judge challenged this tax based on the rule of *Miles*. *O'Malley v. Woodrough*, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289 (1939) (Frankfurter, J.).

For the tax collectors, the third time proved the charm: the Court reversed course, issuing its first rejection of a judge's Compensation Clause challenge to a tax. The Court held that judicial compensation could be taxed, approving Congress's "position that a non-discriminatory tax laid generally on net income is not . . . a diminution [of a federal judge's] salary within the prohibition" of the Compensation Clause. 307 U.S. at 282, 59 S.Ct. at 840. According to the Court, the constitution did not excuse judges from the obligations of citizenship. *Id.* *O'Malley* left *Miles* effectively overruled.[4]

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[4] The court's language is to some degree unclear as to the fate of *Miles*: "But to the extent that what the Court now says

Justice Frankfurter in *O'Malley* also sharply criticized *Evans*, but in a characteristic exercise of judicial restraint was careful to note that only the question of tax immunity for *new* judges was properly at bar, whereas the plaintiff in *Evans* had been a prior judge. *O'Malley*, 307 U.S. at 281-82, 59 S.Ct. at 839-40. As will be seen, *O'Malley* remains the most important precedent in the area of taxation of federal judges.

A generation after *O'Malley*, the Court of Claims[5] thoroughly reviewed Compensation Clause law in *Atkins v. United States*, 214 Ct.Cl. 186, 556 F.2d 1028 (1977) (en banc), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978). This review was occasioned by the suit of a group of federal judges who claimed that their compensation, though nominally unchanged since 1969, had in fact been unconstitutionally eroded by inflation. In rejecting this claim, the Court of Claims gave valuable guidance on the import of *O'Malley* and its predecessors.

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is inconsistent with what was said in *Miles v. Graham*, 268 U.S. 501, 45 S.Ct. 601, the latter cannot survive." 307 U.S. at 282-83, 59 S.Ct. at 840.

[5] In 1982 the Court of Claims and the Court of Customs and Patent Appeals were abolished. Judges of those two courts became judges on the new Court of Appeals for the Federal Circuit. *See* Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, tit. I, § 165, 96 Stat. 25, 50 (1982) (codified as amended at 28 U.S.C. § 44 (1988)). Court of Claims decisions constitute precedent for this court to the same extent as decisions of the Federal Circuit. *South Corp. v. United States*, 690 F.2d 1368 (Fed.Cir.1982).

In analyzing the Supreme Court's holding in *O'Malley*, the Court of Claims in *Atkins* stated that both *Evans* and *Miles* are "no longer good law," *id.*, 214 Ct.Cl. at 213, 556 F.2d at 1043. According to the Court of Claims, *O'Malley* "overruled *Miles*, and by force of reasoning overruled a good deal of *Evans*," *id.* at 215, 556 F.2d at 1044.[6]

Atkins fleshes out the distinction between indirect and direct diminution first alluded to by the Supreme Court in *Evans*, 253 U.S. at 254, 40 S.Ct. at 553. A direct diminution is a reduction in the number of dollars authorized by Congress for a judge's salary, while an indirect reduction, for instance "by virtue of a tax," lowers the take-home pay of a judge but not the statutory salary. *Atkins*, 214 Ct.Cl. at 215, 556 F.2d at 1044. Given that "the purpose of the Compensation Clause is to preclude a financially based attack on judicial independence," *id.* at 222, 556 F.2d at 1048, cases of indirect diminution are to be handled differently from cases of direct diminution. The Court of Claims explained that while the Supreme Court's Compensation Clause cases uniformly agreed that direct diminutions were always prohibited, after *O'Malley* "[i]ndirect, nondiscriminatory diminishments [like taxes] . . . which do not amount to an assault on the independence of the third branch . . . [are not prohibited by] the Compensation Clause," *id.* at 216, 556 F.2d at 1045.

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[6] Also interesting in this regard is Justice Butler's dissent in *O'Malley* itself, which states that the majority in *O'Malley* "intend[ed] to destroy the decision in *Evans v. Gore*." 307 U.S. at 297, 59 S.Ct. at 846.

The 1977 *Atkins* decision is in full accord with the later Supreme Court Compensation Clause case of *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980), which dealt with a direct diminution. In *Will*, scheduled increases in judicial, congressional, and top-level executive pay were withdrawn for four years running, twice just before the raises took hold, and twice just after. Upon a suit by federal judges, the Court held that while the political branches may cancel a prospective judicial salary increase, any increase allowed to become effective even for less than a day is permanent for Article III judges. 449 U.S. at 224-26, 101 S.Ct. at 485-86.

The *Will* decision buttresses the implication of the Court of Claims in *Atkins* that all direct reductions of judicial compensation are invalid regardless of congressional intent: speaking of direct diminutions, the Court said "the Constitution makes no exceptions for 'nondiscriminatory' reductions." 449 U.S. at 226, 101 S.Ct. at 486. As to indirect diminutions, not at issue in *Will*, the Court was not quite so clear. Still, *Will* gives some guidance on indirect diminutions like taxes: the Court discussed *O'Malley* with apparent approval, noting that *O'Malley* validated income taxation of judicial salaries and "recognized that the Compensation Clause does not forbid everything that might adversely affect [the finances of] judges." *Id.* at 227 n. 31, 101 S.Ct. at 486 n. 31. In fact, *Will* may have left open the possibility that even a congressional intent to pressure the judiciary might not invalidate an indirect diminution: "[w]e need not address the question of whether evidence of an intent to influence the Judiciary would invalidate a statute that on its face does not directly reduce judicial compensation."

Id. at 226 n. 30, 101 S.Ct. at 486 n. 30.[7] Of course, in the absence of facts showing bad legislative intent, this legal question is moot. *Atkins*, 214 Ct.Cl. at 216, 228, 235, 556 F.2d at 1045, 1051, 1055.

B

The following two rules and one corollary emerge from the foregoing review of the Compensation Clause case law.[8] First, direct diminution of the salary authorized for federal judges is absolutely forbidden, no matter how innocent the intent of Congress is. Second, so-called indirect diminishments, and specifically income taxes, are permissible even if they result in a reduction in take-home pay for federal judges, *at least* so long as they are not part of an assault on judicial independence. This rule's corollary is that if there is no evidence of legislative intent to influence the judiciary, taxes of general applicability are valid as to Article III judges.

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[7] The Court of Claims, albeit also in *dicta*, took a firmer stand on this issue, indicating that an indirect diminution which discriminated against judges would be remediable by the courts. *Atkins*, 214 Ct.Cl. at 222-23, 556 F.2d at 1048.

[8] *Atkins* as it applies to this case is primarily dicta, since *Atkins* dealt with the impact of inflation on judicial buying power rather than with an impact caused by congressional action. *Will* is likewise not on all fours here, dealing as it does with a direct diminution rather than a tax. *O'Malley*, however, is almost directly on point, with the only arguable distinction being that it does not overtly deal with the problem of taxation of prior judges. Still, as we demonstrate, the *dicta* from *Atkins* and *Will*, read together with the all-important holding in *O'Malley*, form a consistent and common-sensical body of law governing the instant case.

Thus the question in this case is not whether the plaintiffs' compensation has been reduced by Social Security taxes, for at least in terms of take-home pay it has been, but rather whether this indirect reduction is of the type forbidden by the Compensation Clause.[9] As will be shown below, under *O'Malley* and subsequent cases, the answer is no.

III

As to the Compensation Clause claims, (Second Am.Cplt. Counts I-II at 7-8), four basic themes, some of them related, emerge from plaintiffs' briefs and oral argument. First, plaintiffs contend that in overruling *Miles* but not *Evans*, the Supreme Court meant to limit the original broad holding of *Evans* to the following still vital rule: "[E]ven a tax of general applicability cannot be imposed upon [prior] judges who were appointed . . . before the tax became law." Pl.Br. at 29. To some extent linked with this reading

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[9] For the purpose of resolving the motions at bar, we accept plaintiffs' assumption that inclusion in Social Security represents a reduction in judicial pay. But this proposition is by no means settled. If plaintiffs were to prevail in this litigation, and all affected judges were effectively taken out of Social Security and refunded their Social Security taxes, Compensation Clause claims by judges who felt their compensation had been decreased would surely result. For instance, though plaintiffs here claim Social Security coverage *reduces* their compensation, in *Robinson v. Sullivan*, 905 F.2d 1199 (8th Cir. 1990) (Wollman, J.), a senior judge who was retroactively denied Social Security credit for service during a brief window of Social Security coverage for senior judges challenged the denial as a Compensation Clause diminution. This argument was rejected on the grounds that his temporary coverage under Social Security was "not a direct *increase*" in compensation. 905 F.2d at 1202 (emphasis added).

of *Evans* is plaintiffs' second contention that no taxation of judges is permissible if it makes judicial service relatively less attractive than it was when a judge took office. Pl. Br. at 20-21; Pl. Reply at 12-13. Plaintiffs' third argument is that the Social Security tax at issue here is not even an income tax of general applicability such as was permitted to be laid on judges by *O'Malley*. Pl. Br. at 25-26; Pl. Reply at 25-26; Tr. 15-16. Somewhat related to this argument is plaintiffs' last main point: that the scheme designed to bring federal employees under Social Security coverage discriminated against the plaintiff judges compared to other federal workers. Pl. Br. at 37-8, 40, 43; Tr. at 16-17, 19, 72-74. We discuss these four themes in turn.

A

Plaintiffs' first contention is that the factually similar *Evans* case (discussed above in part II A) controls here, and thus that new taxes cannot be imposed on prior judges even if all other citizens are included in the new tax. Pl. Br. at 28-29. While it is true that the Supreme Court has never expressly overruled *Evans*, subsequent Court of Claims and Supreme Court cases convince us it would be irresponsible to dispose of this controversy on that ground. The Supreme Court itself long ago criticized the *Evans* case, *O'Malley*, 307 U.S. at 280-82, 59 S.Ct. at 839-40 (1939), and more recently confirmed that *Evans* has been "undermine[d]," *Will*, 449 U.S. at 227 n. 31, 101 S.Ct. at 486 n. 31. Additionally in *Will*, the Supreme Court reversed a trial judge who expressly relied on *Evans*, albeit in a factually distinguishable case. *Will*, 449 U.S. at 227, 101 S.Ct. at 486-87.

Such negative Supreme Court guidance certainly discourages automatic reliance on *Evans*. But in addition, the *Will* and *O'Malley* decisions at the very least strongly suggest that a tax or other statute which indirectly reduces judicial pay is permissible absent evidence of a congressional intent to influence the judiciary. *Will*, 449 U.S. at 226-27 & nn. 30-31, 101 S.Ct. at 486-87 & nn. 30-31; *O'Malley*, 307 U.S. at 282, 59 S.Ct. at 840. Moreover, the Court of Claims stated that the Supreme Court has effectively overruled *Evans* "*at least* as regards [new] judges," *Atkins*, 214 Ct.Cl. at 215, 556 F.2d at 1044 (emphasis added).

Even in the face of this negative treatment, plaintiffs persist in their claim that though the broad rationale of *Evans* has certainly been narrowed by subsequent case law, the fact that *Evans* has never been expressly overruled means that some part of the holding survives. Pl.Br. at 28. According to plaintiffs, the surviving rule of *Evans* is that under the Compensation Clause, prior judges have more tax protection than new judges: you can't charge a prior judge new taxes. Pl. Br. at 28-29. Adopting this distinction between new and prior judges would require us to read much into *Evans*, because that case nowhere suggested such a difference. In fact the Court in *Evans* broadly defined the issue in that case as the taxability of the "compensation of federal judges *in general*," 253 U.S. at 247, 40 S.Ct. at 551 (emphasis added). We understand that the distinction between prior and new judges was arguably drawn by omission in *O'Malley* when the Court expressly limited its holding to new judges. 307 U.S. at 281-82, 59 S.Ct. at 839-40. But unlike the Court in *O'Malley*, here we are squarely addressed with the question of whether new judges have less tax protection than

prior ones under the constitution. *O'Malley's* failure to expressly address the propriety of new taxes on prior judges is typical of the judicial restraint that Justice Frankfurter was known for, and is not a ruling against such taxation.[10]

Only the quite proper use of judicial restraint in *O'Malley* and later in *Will* prevented the Supreme Court from overruling *Evans*. Now that the question of whether prior judges should be afforded more Compensation Clause protection than new judges is at bar for the first time since the discredited *Miles* decision, reaching back to the 1920 *Evans* case to resolve the question in plaintiffs' favor would require us to willfully ignore the intervening, and uniformly critical, case history. This we decline to do, although because this history developed in factually distinguishable situations, the question in a narrow technical sense will arguably remain open until the Supreme Court addresses the point. As discussed above, the more recent Supreme Court and Court of Claims cases on the Compensation Clause counsel reliance on the dissenting view of Holmes in *Evans* rather than on the majority.[11] Therefore, we hold that

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[10] *See Jefferson County v. Acker*, 850 F.Supp. 1536, 1548 (N.D.Ala.1994) (indicating in *dicta* that new judges would be entitled to the same Compensation Clause protection as the prior judges who were plaintiffs in the case).

[11] Plaintiffs agree that the Court of Claims in *Atkins* read the Supreme Court decision in *O'Malley* to adopt Holmes's dissent in *Evans*. Pl. Br. at 33. (A district judge evaluating *O'Malley* recently came to the same conclusion. *Acker*, 850 F.Supp. at 1546.) Though plaintiffs argue that the *Atkins* and Holmes rule allowing judicial salaries to be taxed is incompatible with the *Will* approach banning any diminution in gross judicial pay, Tr. at 70-71, we disagree. As we explained above

judicial salary, like other components of a judge's income, is taxable. *Will*, 449 U.S. at 227 n. 31, 101 S.Ct. at 486 n. 31 (citing with approval *O'Malley*, 307 U.S. 277, 59 S.Ct. 838 (1939)); *Evans*, 253 U.S. at 265-66, 40 S.Ct. at 557 (Holmes, J., dissenting); *Atkins*, 214 Ct.Cl. at 216, 556 F.2d at 1044-45.

B

Given that we decline to rely on *Evans*, plaintiffs, in the alternative, claim that the statutes in question violate the Compensation Clause by wiping out a tax advantage prior judges enjoyed relative to other citizens, a situation plaintiffs contend to be different from that presented in *Evans*. Plaintiffs argue that in *Evans*, a new tax was imposed on both judges and other citizens "at the same time;"[12] in contrast,

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in part II A, in actuality *Atkins* and *Will* are complementary because they deal with different facts. *Will* expressed the absolute Compensation Clause protection which exists when judicial pay is directly diminished, while the more flexible rule developed in *Atkins* indicates that in cases of indirect, take-home pay diminution like taxation, an inquiry into congressional intent is needed.

[12] Pl. Reply at 16 n. 7. It is unclear what plaintiffs mean by "at the same time." While it certainly is true that the Revenue Act of 1918 (which was at issue in *Evans*) did for the first time tax the income of judges, § 213, 40 Stat. at 1065, it is also true that the Revenue Acts of 1916 and 1917 had already imposed broad-ranging income taxes, although exempting judges already in office, ch. 463, § 4, 39 Stat. 756, 759 (1916); ch. 63, § 1200, 40 Stat. 300, 329 (1917). Thus, the income tax was imposed on the public years before judges were included. Only by artificially viewing each successive year's income tax statute in isolation can it be said that the Revenue Act of 1918 imposed a tax on the public and on judges "at the same time." But for purposes of this discussion only, we accept plaintiffs' characterization.

plaintiffs here were subjected to the extension of an old tax they had escaped by becoming judges, thereby unconstitutionally costing sitting judges an advantage they held relative to non-judges. Pl. Reply 16 n. 7. As we will show, plaintiffs' attempt to distinguish their case from *Evans* fails.

1

Plaintiffs argue that to be valid, any new tax on prior judges must be simultaneous with taxation of the public. Pl. Reply at 16 n. 7; Tr. at 9-10. This is so because as long as an identical burden is simultaneously laid on the public and the judiciary, not even prior judges have suffered a diminution relative to other citizens[13] and so their judicial independence is not potentially threatened. Tr. at 9-10; *see* Pl. Br. at 16, 35-37; Pl. Reply at 19, 21. On the other hand, reason plaintiffs, the taking away of a tax exemption or other advantage held by prior judges relative to other citizens does potentially threaten judicial independence because it singles out judges.[14] *See* Pl. Br. at 20-21, 34; Pl. Reply at 16 n. 7, 19.

Looking past the terms of plaintiffs' seemingly novel relativity argument to its substance, it appears plaintiffs' position at bottom is nothing more remarkable than that a new tax laid wholesale on prior judges and the public is not discriminatory.[15]

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[13] Hereafter, we may refer to this as the "simultaneity requirement."

[14] Hereafter, we may refer to this as plaintiffs' "relativity" argument or analysis.

[15] Plaintiffs posit a scenario (first rhetorically raised in *Atkins*, 214 Ct.Cl. at 223, 556 F.2d at 1048) in which an enormous tax is laid across the land and then all other federal workers or citizens except judges get a raise or some other

While this may be true, it provides no support for plaintiffs' further implication that a tax placed on the public and only later extended piecemeal to prior judges automatically violates the Compensation Clause as a potential threat to the independence of prior judges.

Plaintiffs have pointed to no good reason why Congress in taxing judges has the power to accomplish wholesale what it cannot do piecemeal. *See, e.g.*, Pl. Br. at 34; Pl. Reply at 2-3, 9-10, 12-13, 16 n. 7. Plaintiffs equate comparative tax advantages enjoyed by judges with direct increases in judicial pay, arguing that both should at inception be permanent for judges then in office. Pl.Br. at 30-31, 34; Tr. at 8-9. But the purpose of the Compensation Clause is not to make irrevocable every momentary tax exemption enjoyed by sitting judges relative to the public; its purpose is rather to protect the independence of the judicial branch by insuring that judges are shielded from attempts by the political branches to impose economic duress. *O'Malley*, 307 U.S. at 282, 59 S.Ct. at 840; *Evans*, 253 U.S. at 265-67, 40 S.Ct. at 557-58 (Holmes, J., dissenting); *see Atkins*, 214 Ct.Cl. at 223, 556 F.2d at 1048-49. This underlying purpose leads to the simple rule of thumb which governs this case: in general, if judges are treated like other citizens by the tax laws, no threat to judicial independence arises, and so the Compensation Clause is not implicated. Congress always has the power to place judges in tax parity with other citizens.

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kind of relief. Pl. Br. at 36 n. 22. Suffice it to say that we do not here prejudge such a case.

2

Plaintiffs profess not to rely on *Evans* in deriving the simultaneity requirement for the taxation of prior judges. But plaintiffs' simultaneity requirement leads inescapably to the conclusion that the Compensation Clause provides the class of prior judges more tax protection than it does to new judges. This is the very conclusion that we rejected in refusing to rely on *Evans* above in part A. The new packaging does not yield a different result. Barring some sort of targeted discrimination, the finances of one individual judge or even a class of judges is not the concern of the Compensation Clause.[16] There is no requirement that prior judges be treated any differently from new judges for tax purposes: a judge escapes neither the present nor the future obligations of citizenship by taking the oath of office.

C

Plaintiffs go on to claim that even with the above arguments conceded Social Security is not a tax of general applicability like the one which was held proper as to judges in *O'Malley*. Pl. Reply at 24-25; Tr. at 15-16, 72-73. In this vein, plaintiffs first contend that Social Security is not an income tax, but is

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[16] The proper constitutional focus is on the interaction between the branches of government, not on the appointment dates of individual judges. (It might be said that plaintiffs' analysis neglects the constitutional dimension of this case in favor of the astronomical.) The Compensation Clause is "not a private grant of privilege [to judges] but a limitation intended to benefit the public at large," *Atkins*, 214 Ct.Cl. at 223, 556 F.2d at 1049. The same idea is expressed in *Will*, 449 U.S. at 217, 101 S.Ct. at 481-82 and *O'Donoghue v. United States*, 289 U.S. 516, 533, 53 S.Ct. 740, 744, 77 L.Ed. 1356 (1933).

rather a contributory public benefit plan. *E.g.* Pl.Br. at 26-27. In addition, plaintiffs maintain that Social Security taxes are not a truly general obligation of citizenship because the plan is not universal. *Id.*; Tr. at 72-73.

1

A close reading of plaintiffs' arguments shows that they do not seriously contend that Social Security is a contractual benefit plan rather than an income tax. In fact, plaintiffs themselves note that Social Security benefits are by no means guaranteed, and that the Congress could limit or cancel benefits under the program. Tr. at 10-11 (citing *Bowen v. Public Agencies Opposed to Soc. Secur. Entrapment*, 477 U.S. 41, 51-52, 106 S.Ct. 2390, 2396-97, 91 L.Ed.2d 35 (1986)). We agree. Of course, the taking of money by the federal government with no specific return obligation is typical of tax schemes, including income taxes. And, in fact, Social Security has long been treated as an income tax by courts. *Helvering v. Davis*, 301 U.S. 619, 634-35, 57 S.Ct. 904, 905-06, 81 L.Ed. 1307 (1937). It is plain that Social Security imposes an income tax.

2

At the heart of plaintiffs' argument that Social Security is not a tax of general applicability is the contention that the Social Security income tax is not sufficiently widespread. *See* Pl.Br. at 26, 36-37; Tr. at 72. We disagree. Social Security is a tax of general applicability, and so can be applied to federal judges. The parties have stipulated to the following facts: during 1984, the percentage of the paid civilian labor force covered by Social Security climbed from 91 percent to 93 percent, Jt. Stip. ¶ 18 (Appendix C to Pl.

Br.), even while the paid civilian labor force increased from 102.2 million workers to 105.5 million, Jt. Stip. ¶ 27 (Table 4).

This amounts to effectively universal coverage of the nation's work force.[17] Given the web of exemptions and deductions allowed by Congress in virtually all areas of taxation, it is doubtful if any federal tax is of general applicability in the sense of applying to 100 percent of the possible taxpayers. We do not need to decide the boundaries of the term "a tax of general applicability" today. It is enough to say that the Social Security income tax, which at all times relevant to this litigation covered over 90 percent of paid civilian workers, is a tax of general applicability like that held valid as to judges by the Supreme Court in *O'Malley*.

D

Plaintiffs' last main Compensation Clause contention, somewhat linked to the idea that Social Security is not a tax of general applicability, is that the plaintiff judges were discriminated against as compared to the other federal employees affected by the same Social Security amendments. Pl. Br. at 37-38, 40, 43; Pl. Reply at 24; Tr. at 12, 15-17, 19, 22-23, 72-74. Plaintiffs contend that a Compensation Clause violation arises because judges, unlike all other federal employees, faced a mandatory reduction in take-home pay. Pl.Br. at 40, 43; Tr. at 74-75.

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However, using federal employees instead of the general public as the Compensation Clause bench-

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[17] In September 1983, there were over 2.7 million federal employees. Jt. Stip. P 19.

mark to determine the validity of a tax does not help plaintiffs in this case, since for purposes of this discussion the two groups have historically been treated alike.

Most federal employees have long been required to contribute to retirement plans in order to obtain retirement benefits. *See* 5 U.S.C. §§ 8331-48 (1988). This does not apply to Article III judges, whose basic retirement plan is free, and provides for lifetime full pay when certain age and length of service requirements are met. 28 U.S.C. § 371 (1988). By the acts challenged here, Congress expanded Social Security to cover most federal positions, including Article III judgeships, for the first time. Jt. Stip. ¶ 20. Speaking generally, Congress reduced or offset the contribution federal employees were required to make to their retirement plan by the amount of any newly required Social Security tax. Pl. Proposed Findings of Uncontroverted Fact ¶ 11 ("PPUF"). The retirement plan benefits of federal employees were correspondingly reduced to account for any newly expected Social Security benefits. *E.g.*, Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub.L. 98-168, § 206(c)(2), 97 Stat. 1106, 1109-10 (1983) (codified as amended in a note after 5 U.S.C. § 8331 (1988)). The net result of inclusion in Social Security for most federal workers thus was no change in take-home pay or benefits. It is plainly the view of Congress that the Social Security tax is fungible with the other retirement payments required of federal employees. Thus, both before and after the acts in question, almost all non-judicial federal employees, like over 90 percent of the nation's civilian workers, paid Social Security taxes or a mandatory equivalent.

Judges, with no retirement plan contributions to offset, were unique among federal employees in seeing their take-home pay necessarily decrease by the amount of the Social Security tax. PPUF ¶ 12. But this happened only because judges, unlike other federal employees and citizens, were never before required to pay into Social Security or a retirement plan equivalent to Social Security. There is no reason that tax burdens equivalent to those long required of other federal employees and working citizens cannot be extended to judges. *See supra*, part B(1). Here, the central Compensation Clause taxation rule has not been violated: judges are being treated no worse than other federal employees and citizens.

2

Even if we were to assume that the Social Security taxes at issue here did hurt judges compared to other federal workers, plaintiffs' Compensation Clause claim would not succeed. This is because in cases of indirect reduction in judicial compensation, it is an open question whether evidence of Congressional intent to pressure the judiciary would be enough to invalidate a statute. *Will*, 449 U.S. at 226 n. 30, 101 S.Ct. at 486 n. 30. At any rate, without evidence of such an intent this legal question is moot. *Atkins*, 214 Ct.Cl. at 216, 228, 235, 556 F.2d at 1045, 1051, 1055.

In this case, there is absolutely no evidence of an intent to influence the judiciary. This conclusion is not disputed by plaintiffs, Pl. Br. at 21-22; *see* Pl. Reply at 2; rather, plaintiffs' by-now familiar argument is that any reduction in take-home pay should be handled like a direct reduction in salary, that is to say it is prohibited by the Compensation

Clause regardless of congressional intent. Pl.Br. at 21-23; Pl. Reply at 2, 10, 12; Tr. at 69, 71-72.

As indicated above, plaintiffs' conclusion ignores two related rules of Compensation Clause jurisprudence. First, in case of an indirect diminution of judicial compensation, it is *at least* arguable that judges seeking relief under the Compensation Clause for an indirect reduction in pay must show not just a discriminatory effect but an intent to influence the judiciary. *See Will*, 449 U.S. at 226 n. 30, 101 S.Ct. at 486 n. 30; *Atkins*, 214 Ct.Cl. at 233, 556 F.2d at 1054. Second and more important to the instant case, it is clear that if the indirect diminution is due to a tax of general applicability and the possibility of discriminatory legislative intent has been ruled out, the tax is valid under the Compensation Clause. *O'Malley*, 307 U.S. at 282, 59 S.Ct. at 840; *Atkins*, 214 Ct.Cl. at 216, 556 F.2d at 1044-45. That is the case here.

IV

Plaintiffs claim that if their constitutional argument fails, they still may be able to prevail on a contract theory. Second Am.Cplt. Count III at 8-9. Defendant has moved for summary judgment on the contract claim, maintaining that judges serve pursuant to appointment, not contract. Def.Br. at 38-41.

Plaintiffs are unable to cite any convincing authority for the proposition that judges are contract employees. *See, e.g.*, Pl. Reply at 27-29; Tr. at 31- 38. Plaintiffs point chiefly to *Embry v. United States*, 100 U.S. 680, 25 L.Ed. 772 (1879), wherein the Supreme Court made the following statement: "No officer except the President or a judge of a court of the United States can claim a contract right to any

particular amount of unearned compensation." 100 U.S. at 685. While this isolated sentence may be in plaintiffs' favor, the case it comes from is not. The holding of *Embry* is not that judges have a contract right to compensation while in office; in fact, the case is not about judges at all, nor even about incumbent officeholders. Instead, *Embry* holds that non-judicial federal officers such as postmasters do not have a contract right to compensation while suspended from office. 100 U.S. at 685. Since judges can only be impeached, not suspended, *Embry* has no relevance here. At any rate, the sentence relied on by plaintiffs, besides being taken out of context, is wholly unnecessary to the holding of the case and thus a textbook example of *dicta*.

Plaintiffs claim that even if *Embry* is distinguishable, this case falls squarely under the rule of *Johnson v. United States*, 111 Ct.Cl. 750, 79 F.Supp. 208 (1948). Tr. at 66. Again, we disagree. Johnson involved a judge who resigned from office. The Court of Claims found that such a judge has a contract or property right to his retirement pay. 111 Ct.Cl. at 756, 79 F.Supp. at 211. Without assessing the validity of this *Johnson* holding today, we note that a judge who resigns (as the plaintiff did in *Johnson*) is no longer a federal officeholder. *Booth v. United States*, 291 U.S. 339, 348-50, 54 S.Ct. 379, 380-81, 78 L.Ed. 836 (1934). At best for plaintiffs, *Johnson* holds that judges who resign from office in reliance on future retirement payments may have a contract remedy. The Johnson case has no applicability to cases involving compensation for sitting Article III judges.[18]

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[18] This conclusion is strengthened by the fact that the Court of Claims in *Johnson* did not once cite the *dicta* from

Plaintiffs have cited no controlling authority indicating a possible contract claim. Pl. Reply at 27-29; Tr. at 31-37, 65-66. In our view, no such claim exists.

V

Plaintiffs' contention that the extension of Social Security taxes to sitting Article III judges violated the Compensation Clause is a pure question of constitutional law. There are no material facts in dispute. Therefore, defendant is entitled to judgment on Counts I and II, (Second Am.Cplt. at 7-8), as a matter of law. RCFC 56(c).

Plaintiffs' contention that they have a contract right to compensation is likewise a pure question of law involving no disputed material facts. Therefore, defendant is entitled to judgment on the contract claim, (Count III, Second Am.Cplt. at 8-9), as a matter of law. RCFC 56(c).

Based on the foregoing, plaintiffs' motion for summary judgment is DENIED, and defendant's cross-motion for summary judgment is GRANTED. Accordingly, judgment shall be entered in favor of defendant.

Each party shall bear its own costs.

Embry which, if read in isolation, indicates that sitting judges have a contract right to compensation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 91-5039

JUDGE TERRY J. HATTER, JR., JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ AND CHIEF JUDGE THOMAS A. WISEMAN, JR., PLAINTIFFS-APPELLANTS,

v.

THE UNITED STATES, DEFENDANT-APPELLEE

[Filed: Jan. 16, 1992]

Before: ARCHER, PLAGER and RADER, Circuit Judges.

RADER, Circuit Judge.

Terry J. Hatter, Jr., et al., life-tenured federal judges, appeal the dismissal of their complaint by the United States Claims Court. *Hatter v. United States*, 21 Cl.Ct. 786 (1990). The judges allege that imposition of social security taxes diminished their compensation in violation of the United States Constitution. The Claims Court dismissed their complaint for lack of jurisdiction. Because the Tucker

Act gives the Claims Court jurisdiction over claims of salary diminution under Article III of the Constitution, this court reverses and remands.

BACKGROUND

In 1983, Congress passed the Social Security Amendments of 1983. *See* 42 U.S.C. § 410(a)(5)(C)-(G) (1988). This Act extended social security coverage to many Government employees, including federal court of appeals and district court judges.* Previously, federal judges were exempt from paying social security taxes.

On January 1, 1984, the Social Security Amendments imposed Federal Insurance Contributions Act ("FICA") taxes on federal judges. From 1984 to 1989, plaintiffs each paid the following amounts in FICA taxes:

YEAR	*TAX*
1984	$2,532.60
1985	$2,791.80
1986	$3,003.00
1987	$3,131.70
1988	$3,379.50
1989	$3,604.80

On December 29, 1989, plaintiffs filed a complaint in the Claims Court. In count I, plaintiffs contend that the 1983 Amendments "unlawfully diminished and continues to diminish plaintiffs' compensation in vio-

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* No member of this panel was an Article III judge in 1984. Therefore, no panel member suffered an alleged diminution in salary when the 1983 Amendments took effect.

lation of Article III, Section 1, of the Constitution of the United States." Under this count, plaintiffs sought monetary damages to compensate for their diminished wages. Count II claims that plaintiffs have an employment contract with the Government which protects them against diminishment of their compensation. Again, plaintiffs seek damages for breach of contract.

The Government moved to dismiss the complaint for lack of jurisdiction because plaintiffs did not file an administrative claim for a tax refund. *See* 26 U.S.C. § 7422(a) (1988). The Claims Court granted the Government's motion. Plaintiffs appealed.

DISCUSSION

This court must decide whether appellants have stated a case within the Claims Court's jurisdiction under 28 U.S.C. § 1491 (1988) (Tucker Act). Under the Tucker Act, the United States has waived sovereign immunity for suits in the Claims Court:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> 28 U.S.C. § 1491(a)(1).

The Tucker Act alone, however, does not create a substantive right to collect money damages from the United States. *United States v. Testan*, 424 U.S. 392, 398, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976); *Eastport*

S.S. v. United States, 372 F.2d 1002, 1007-09, 178 Ct.Cl. 599 (1967). Rather, the Act empowers the Claims Court to award damages for the violation of substantive rights embodied in the Constitution, federal statutes, executive regulations, or federal contracts. *United States v. Mitchell*, 463 U.S. 206, 216-17, 103 S.Ct. 2961, 2967-68, 77 L.Ed.2d 580 (1983).

Thus, to invoke Tucker Act jurisdiction, claimants must show that their claim arises under an independent source of federal law. Moreover, the federal law or contract, fairly interpreted, must provide a damages remedy for violations. *Id.* In sum, appellants must show their claim arises from a federal constitutional, statutory, regulatory, or contractual provision that provides damages for its breach.

Appellants base their Tucker Act claim on Article III, Section 1, of the United States Constitution:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. III, § 1. Appellants thus invoke the Constitution as an independent source of federal law providing for the payment of money.

This provision of the Constitution, fairly interpreted, mandates the payment of money in the event of a prohibited compensation diminution. This provision states, in mandatory and unconditional terms, that judges' salaries "shall not be diminished during their Continuance in Office." This language presupposes damages as the remedy for a governmental act violating the compensation clause. Only a timely re-

storation of lost compensation would prevent violation of the Constitution's prohibition against diminution of judicial salaries.

Thus, the Constitution mandates that federal judges must receive, "during their Continuance in Office," compensation for their services which may not be less than their compensation upon assuming office. In the event of a violation of this clause, the Constitution itself provides a remedy—compensation. In sum, by forbidding any diminution of judicial compensation, the Constitution itself requires repayment of prohibited reductions in compensation to Article III judicial officers.

The history of the compensation clause supports this court's reading that a violation of the clause mandates repayment or compensatory damages. According to James Madison's notes, the delegates to the Philadelphia Convention discussed the compensation clause on July 18, 1787. 2 Max Farrand, *The Records of the Federal Convention of 1787*, 44-45 (1911). Gouverneur Morris proposed wording the compensation clause to prevent "any improper dependence in the Judges." *Id.* James Madison, in response, shared Morris's view that the Constitution should reduce any dependence by the judicial branch on the other branches for compensation. *Id.* at 45. Alexander Hamilton, too, explained the compensation clause:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in

> practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.

The Federalist No. 79, at 472 (Alexander Hamilton) (emphasis in original) (Clinton Rossiter ed., 1961). These framers of the Constitution shared a common vision of the undiminishable compensation clause.

These observations by the framers of the compensation clause underscore its importance to the preservation of judicial independence in a system of separated powers. These comments also suggest that judicial officers deprived of full compensation need not rely on legislative or executive action for a remedy. To require further legislative or executive actions to enforce the compensation clause would frustrate Article III's purpose of judicial independence. The purpose of Article III, § 1, as well as its language, embraces a self-executing compensatory remedy.

The Supreme Court has also considered whether an alleged violation of the compensation clause provides Tucker Act jurisdiction. *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980). In *Will*, several federal judges sought review of four statutes purporting to stop or reduce cost-of-living increases for judges. The Court concluded that two of the four statutes purported to roll back judicial salary increases already in effect. These statutes violated Article III, § 1. *Id.* at 226, 230, 101 S.Ct. at 486, 488. Any legislative attempt to rescind those effective salary increases would diminish judges' compensation. The Court upheld the other two statutes because they affected salary increases not yet in effect. *Id.* at 229, 101 S.Ct. at 487. Therefore, those two

statutes did not diminish judicial salaries. The case was remanded to the trial court to determine money damages. *Id.* at 230-31, 101 S.Ct. at 488.

To reach these substantive results, the Court necessarily examined the jurisdiction of the trial courts to enforce the compensation clause. The Court stated that both the Court of Claims, the predecessor to the Claims Court's trial jurisdiction, and district courts had jurisdiction to determine whether the four statutes violated Article III, § 1. The Court stated:

> [T]here is no doubt whatever as to this Court's jurisdiction under 28 U.S.C. § 1252 or that of the District Court under 28 U.S.C. § 1346(a)(2) (1976 ed., Supp. III).

Id. at 210-11, 101 S.Ct. at 478 (footnote omitted). "Jurisdiction being clear," *id.* at 211, 101 S.Ct. at 479, the Court proceeded to the next inquiry.

The Court felt jurisdiction was "clear" based on 28 U.S.C. § 1346(a)(2). In a footnote, the Court explained:

> This provision confers on the district courts and the Court of Claims concurrent jurisdiction over actions against the United States based on the Constitution when the amount in controversy does not exceed $10,000.

Id. at 211, n. 10, 101 S.Ct. at 478, n. 10. Section 1346(a)(2) of title 28, also known as the Little Tucker Act, mirrors the Tucker Act. It provides district courts concurrent jurisdiction with the Claims Court to handle claims against the United States, "not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress." The Supreme

Court found jurisdiction in the district court for the *Will* plaintiffs under the Little Tucker Act.

The only jurisdictional difference between the appellants in *Will* and the plaintiffs in this case is the amount in controversy. Plaintiffs in this case seek more than $10,000 in damages. The Supreme Court found jurisdiction under the Little Tucker Act in the district court for the *Will* plaintiffs. The Tucker Act provides jurisdiction in the Claims Court for the plaintiffs in this case.

The Claims Court erred by recharacterizing plaintiffs' action as solely a request for a tax refund. Plaintiffs' complaint sought damages for violation of the compensation clause. Nonetheless, the Claims Court read their claim as a tax refund suit. The Claims Court erred by imposing a single legal theory on the plaintiffs' complaint.

The Federal Rules of Civil Procedure permit parties to pursue their claim on any viable legal theory. Fed.R.Civ.P. 8(e)(2). In this case, plaintiffs could have pursued a tax refund. If they had, as the Claims Court noted, title 26 would have required a prior administrative claim. *See*, 26 U.S.C. § 7422(a). Plaintiffs, however, did not pursue a tax refund. Instead they sought damages for violation of Article III, § 1—an action which is within the Tucker Act jurisdiction of the Claims Court.

By requiring prior filing of an administrative claim with the Internal Revenue Service for a compensation clause violation, the Claims Court overlooked the language and purpose of Article III, § 1. Conditioning redress of an alleged compensation clause breach on executive branch actions would frustrate the purpose of Article III, § 1. The Constitution provides a com-

pensatory remedy without need for reliance on other branches.

The Claims Court based its recharacterization of plaintiffs' action on two cases, *O'Malley v. Woodrough*, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289 (1939), and *King v. United States*, 390 F.2d 894, 182 Ct.Cl. 631 (1968), *rev'd on other grounds*, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). In *O'Malley*, the plaintiffs challenged the validity of federal income taxes because withholding revenues allegedly diminished federal judges' salaries. The Court determined that Article III did not bar Congress from imposing a non-discriminatory income tax on federal judges. *O'Malley*, 307 U.S. at 282, 59 S.Ct. at 840. *O'Malley*, however, does not affect the jurisdiction of the Claims Court. Contrary to the Claims Court's statement, *Hatter*, 21 Cl.Ct. at 789, the Supreme Court did not recast *O'Malley*'s plaintiffs' diminution claims as tax refund actions. The *O'Malley* plaintiffs elected to sue the Collector of Internal Revenue for a refund, rather than seeking damages. The *O'Malley* plaintiffs' election in the 1930s, however, hardly binds the *Hatter* plaintiffs in the 1990s. As noted earlier, the Tucker Act provides plaintiffs an independent action for damages based on a purported violation of Article III, § 1.

By improperly recharacterizing plaintiffs' action, the Claims Court also foreclosed an issue to be determined on the merits. *O'Malley* determined that federal income taxes do not have a discriminatory impact on federal judges. Plaintiffs have had no opportunity to demonstrate whether the social security tax is discriminatory. The Claims Court erred in foreclosing this issue without full con-

sideration of the merits. On remand, the Claims Court will have an opportunity to examine whether social security taxes have a discriminatory effect on federal judges.

The Claims Court also erred in viewing *King* as identical to this case for jurisdictional purposes. *Hatter*, 21 Cl.Ct. at 788. King was an Army Colonel who claimed that he had paid too much federal income tax because the Government misclassified his retirement status. The Court of Claims dismissed Colonel King's tax refund claim for failure to file a prior administrative claim with the Internal Revenue Service. *King*, 390 F.2d at 896. In equating the *Hatter* plaintiffs with Colonel King, the Claims Court overlooked pertinent distinctions.

First, plaintiffs in this case have an independent jurisdictional basis for their claim. Colonel King had no choice except to seek a tax refund. Second, unlike Colonel King, plaintiffs here do not challenge the United States' authority to impose a tax. Plaintiffs merely seek compensation to ensure that imposition of a tax does not diminish their salary. In sum, plaintiffs do not seek tax refunds, but compensation to ensure compliance with Article III, § 1. The Tucker Act provides the Claims Court jurisdiction to adjudicate this action.

CONCLUSION

Appellants' claim for relief states a claim within the jurisdiction of the Claims Court. Therefore, the decision of the Claims Court is reversed and this case is remanded for a hearing on the merits.

REVERSED AND REMANDED.

APPENDIX D

UNITED STATES CLAIMS COURT

No. 705-89 C

TERRY J. HATTER, JR., ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Nov. 9, 1990]

OPINION AND ORDER

TURNER, Judge.

Plaintiffs are ten Article III* federal judges serving on various United States district courts and

* The designation stems from Article III, Section 1, of the United States Constitution which provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, *receive for their Services a Compensation, which*

on one United States court of appeals. They bring this action pursuant to U.S. Const. art. III, § 1 (Compensation Clause) claiming that their compensation has been diminished by reason of the Social Security Amendments of 1983, Pub.L. 98-21, § 101, 97 Stat. 65, 68 (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.). Plaintiffs seek damages in the amount of the Social Security taxes withheld from their salaries from January 1, 1984 to the present.

Defendant filed a motion to dismiss the complaint pursuant, *inter alia*, to RUSCC 12(b)(1). It alleges that this is a tax refund suit over which the Claims Court currently lacks subject matter jurisdiction because the plaintiffs failed to file an administrative claim for refund with the Internal Revenue Service as required by 26 U.S.C. § 7422(a). Hearing concerning defendant's motion was conducted on November 9, 1990 in Washington, D.C.

For reasons stated below, we conclude that the Claims Court lacks subject matter jurisdiction over the complaint at this time. Although plaintiffs characterize their claims as ones for damages other than a tax refund, we conclude that, in essence, their claims are for tax refunds which must be brought first before the IRS. 26 U.S.C. § 7422(a).

I

Prior to January 1, 1984, the salaries of Article III judges were not subject to withholding for Social Security taxes. Effective January 1, 1984, Congress amended the Social Security Act, 42 U.S.C. § 410(a)(5)(E) (1988), and the Internal Revenue Code of

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shall not be diminished during their Continuance in Office. [Emphasis added.]

1954, 26 U.S.C. § 3121(b)(5)(E) (1988), extending Social Security coverage to many previously exempt civilian government employees, including judges of the United States district courts and courts of appeals. Pursuant to this statute, the plaintiffs in this case had the following amounts withheld from their salaries during the years 1984 through 1989:

Year	*Amount Withheld*
1984	$2,532.60
1985	$2,791.80
1986	$3,003.00
1987	$3,131.70
1988	$3,379.50
1989	$3,604.80

All of the plaintiffs were appointed and took office prior to January 1, 1984, the effective date of the amendments. At the time of their respective appointments, the only mandatory deductions from their salaries were for federal and state income taxes. No mandatory deductions were made for retirement or for Social Security benefits. Plaintiffs now seek to recover as damages the amounts withheld for Social Security taxes.

II

Title 26 U.S.C. § 7422(a) provides in pertinent part:

> *No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or*

> *credit has been duly filed with the Secretary*, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. [Emphasis added.]

Plaintiffs concede that if the court determines that their claims are for tax refunds, then they must file an administrative refund claim with the IRS before suit may be brought in this court. *See* 26 U.S.C. § 7422(a). They argue, however, that this is not a tax refund suit but rather a claim for damages based on the diminution in compensation caused by withholding the Social Security tax from their salaries. To support their position, plaintiffs rely on the Court of Claims opinion in *Atkins v. United States*, 556 F.2d 1028, 214 Ct.Cl. 186 (1977), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978). They argue that since, according to *Atkins*, the court would have great flexibility in fashioning a remedy for a violation of the Compensation Clause, their claim is somehow distinguished from an ordinary tax refund suit. Plaintiffs argue that the court could provide a remedy by awarding damages or by ordering an appropriate increase in their salaries to counteract the effect of the Social Security deductions. The possibility of alternative relief, according to plaintiffs, demonstrates that defendant's characterization of their claim as one for a tax refund is mistaken.

Defendant argues that this is a tax refund suit, relying primarily on the Court of Claims opinion in *King v. United States*, 390 F.2d 894, 896, 182 Ct.Cl. 631, 633-34 (1968), *rev'd on other grounds*, 395 U.S. 1, 2, 89 S.Ct. 1501, 1501-02, 23 L.Ed.2d 52 (1969). In *King*, the plaintiff was a retired Army colonel who claimed that by misclassifying his armed services retirement

status, the government caused him to pay federal income taxes which he was not legally obligated to pay. King asserted that he should be allowed to maintain his claim even though he had not filed a refund claim with the IRS. The Court of Claims held that his monetary claim was barred because he did not file an administrative refund claim but granted him relief in the form of a declaratory judgment and was later reversed on this ground. 395 U.S. at 5, 89 S.Ct. at 1503.

Although *King* did not involve a diminution claim based on the Compensation Clause, we conclude that it is more analogous to the present case than *Atkins*. Plaintiffs attempt to distinguish their case from *King* on the ground that, unlike *King*, they do not challenge the government's authority to deduct Social Security contributions from their wages. Plaintiffs argue that if they are legally obligated to pay the Social Security taxes, then the diminution which results must be rectified. Putting aside semantics, we find that this is a tax refund suit. Like the plaintiff in *King*, plaintiffs here are asserting that they should be allowed to maintain their claim in this court even though they have not filled a refund claim with the IRS. For jurisdictional purposes, plaintiffs' position is identical to the plaintiff in *King* and we find it controlling.

The fact that the plaintiffs in *Atkins* brought a claim for damages is of no help to the plaintiffs in this case. The claim in *Atkins* was for a violation of the Compensation Clause based on alleged diminution in salary caused by inflation and by the failure of Congress to raise judicial salaries. Since *Atkins* did not involve alleged diminution by taxation, it did not

present a jurisdictional problem for the court similar to the one addressed in *King*.

The issue of whether taxes withheld from Article III judicial salaries constitute a diminution in violation of the Compensation Clause is not new. It was first brought before the United States Supreme Court in 1920 in a case involving income taxes. *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920). Thereafter, each time the "diminution" issue has arisen in the context of income taxes, the claim originated as one against the IRS. *See Miles v. Graham*, 268 U.S. 501, 45 S.Ct. 601, 69 L.Ed. 1067 (1925), *overruled by O'Malley v. Woodrough*, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289 (1939). In *O'Malley*, the Supreme Court described the suit below as "an action at law to recover a tax on income claimed to have been illegally exacted." 307 U.S. at 278, 59 S.Ct. at 838. The Court further noted that the suit had been brought against the Collector of Internal Revenue and the plaintiff's claim for refund had been rejected. 307 U.S. at 279, 59 S.Ct. at 838-39.

None of the claims for violation of the Compensation Clause brought after *O'Malley* was based on taxes. *See United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980); *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076, 101 S.Ct. 854, 66 L.Ed.2d 798 (1981); *Atkins v. United States*, 556 F.2d 1028, 214 Ct.Cl. 186 (1977), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978).

We conclude that there is no logical reason to view a claim for diminution based on Social Security taxes differently from one based on income taxes. In order to obtain a refund of either, the claim must be brought before the IRS prior to filing a complaint in this

court. Manifestly, however artfully characterized, plaintiffs seek recovery of Social Security taxes which have been deducted from their salaries since January 1, 1984. Based on the Supreme Court's interpretation of diminution claims involving income taxes as claims for a tax refund rather than damages, the Court of Claims opinion in *King*, and the face of 26 U.S.C. § 7422(a), we conclude that plaintiffs' claims are for tax refunds over which this court lacks subject matter jurisdiction at this time.

III

Defendant's motion to dismiss filed on May 15, 1990, to the extent that it asserts this court's current lack of jurisdiction, *see* RUSCC 12(b)(1), is GRANTED. It is ORDERED that judgment be entered dismissing the complaint for lack of jurisdiction.

Each party shall bear its own costs. *See Johns-Manville Corp. v. United States*, 893 F.2d 324, 328 (Fed.Cir. 1989) ("the Claims Court has no power to award costs in cases over which it has no . . . jurisdiction").

APPENDIX E

UNITED STATES COURT OF APPEALS FOR FEDERAL CIRCUIT

No. 94-5139

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A. J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER, AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFFS-APPELLANTS,

v.

THE UNITED STATES, DEFENDANT-APPELLEE

[Filed: Dec. 26, 1995]

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having

been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on January 2, 1996.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: December 26, 1995

/s/ By DIANE M. FRYE
DIANE M. FRYE
Chief Deputy Clerk

cc: STEVEN S. ROSENTHAL
JEANNE E. DAVIDSON

HATTER V US, 94-5139
(CFC - 89-705C)

APPENDIX F

UNITED STATES COURT OF APPEALS FOR FEDERAL CIRCUIT

No. 94-5139

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A. J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER, AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFFS-APPELLANTS,

v.

THE UNITED STATES, DEFENDANT-APPELLEE

[Filed: Aug. 30, 1995]

JUDGMENT

Appeal from a decision of the United States Court of Federal Claims in 89-705C entered June 24, 1994, Judge James T. Turner.

This CAUSE having been heard and considered, it is

ORDERED AND ADJUDGED:

REVERSED and REMANDED.

ENTERED BY ORDER OF THE COURT

DATED: AUG 30 1995

/s/ FRANCIS X. GINDHART
FRANCIS X. GINDHART, Clerk

ISSUED AS A MANDATE: January 2, 1996

Supreme Court, U.S.
FILED
JUN 24 1996
CLERK

No. 95-1733

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

JUDGE TERRY J. HATTER, JR., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

1. Whether Article III, Section 1 of the Constitution of the United States permits Congress to impose a new tax on the compensation of sitting Article III judges.

2. Whether Article III, Section 1 of the Constitution of the United States permits Congress to impose, through a new tax, a discriminatory economic burden on sitting Article III judges.

3. Whether some Members of this Court, but less than all Members, are disqualified from hearing and deciding the case under 28 U.S.C. § 455(b)(4).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
ADDITIONAL STATUTORY PROVISIONS INVOLVED	1
COUNTER-STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	11
I. THE RULING BELOW WAS CLEARLY CORRECT	12
II. THE RULING BELOW IS INDEPENDENTLY SUSTAINABLE ON THE GROUND THAT THE STATUTES AT ISSUE DIMINISHED JUDICIAL COMPENSATION IN A DISCRIMINATORY MANNER	18
III. THE RULING BELOW HAS LIMITED PRECEDENTIAL AND REMEDIAL IMPLICATIONS	23
THE DISQUALIFICATION ISSUE	24
CONCLUSION	30

APPENDIX A — Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub. L. No. 98-168, 97 Stat. 1106 (1983), 5 U.S.C. § 8331 note 1a

APPENDIX B — Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494 (1984), 5 U.S.C. § 8331 note 14a

APPENDIX C — Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986), 5 U.S.C. § 8331 note 17a

APPENDIX D — 28 U.S.C. § 455 ..... 21a

APPENDIX E — 28 U.S.C. § 2109 ..... 25a

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Ash Grove Cement, 459 U.S. 1190 (1983) 30

Arizona v. United States District Court, 459 U.S. 1191 (1983) 30

Atkins v. United States, 556 F.2d 1028 (Cl. Ct. 1977), *cert. denied, 434 U.S. 1009 (1978)* 16, 17

Baker v. Commissioner, 149 F.2d 342 (4th Cir.), *cert. denied*, 326 U.S. 746 (1945) 16

Commonwealth ex rel. Hepburn v. Mann, 5 Watts & Serg. 403 (Pa. 1843) 15

Evans v. Gore, 253 U.S. 245 (1920) ..... *passim*

Gordy v. Dennis, 176 Md. 106, 5 A.2d 69 (1939) 15

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 25

Long v. Watts, 183 N.C. 99, 110 S.E. 765 (1922) 15

Miles v. Graham, 268 U.S. 501 (1925) 14

O'Donoghue v. United States, 289 U.S. 516 (1933) 2

O'Malley v. Woodrough, 307 U.S. 277 (1939) ..... *passim*

In re Opinions of the Justices, 225 Ala. 502, 144 So. 111 (1932) 15

United States v. IBM Corp., 64 U.S.L.W. 4419 (U.S. June 10, 1996). 17

United States v. Will, 449 U.S. 200 (1980) ..... *passim*

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 26

CONSTITUTION, STATUTES & REGULATIONS

U.S. Const. art. III, § 1 ..... *passim*

Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494 (1984), 5 U.S.C. § 8331 note 8

Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub. L. No. 98-168, 97 Stat. 1105 (1983), 5 U.S.C. § 8331 note 6
§ 207 6
§ 208 7

Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986), 5 U.S.C. § 8331 note 8
§ 301(a) 8
§ 301(b) 8

Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983) ..... *passim*

Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982) 2

Federal Employee Retirement System Act of 1986, 5 U.S.C. §§ 8401-8479 8

Tucker Act, 28 U.S.C. § 1491 (a)(1) 26

28 U.S.C. § 1 29

28 U.S.C. § 371 20

28 U.S.C. § 371(a) 5

28 U.S.C. § 371(b) 5

28 U.S.C. § 376 5

28 U.S.C. § 455(b)(4) 25

28 U.S.C. § 455(d)(4) 25

28 U.S.C. § 2109 29

28 U.S.C. § 2401(a) 26

28 U.S.C. § 6511(a) 26

42 U.S.C. § 410(a)(5) 5

42 U.S.C. § 410(a)(5)(C)-(G) 4

42 U.S.C. § 410(p) 5

OTHER AUTHORITIES

The Federalist No. 79 (Hamilton) (Clinton Rossiter ed., 1961) 12, 13

Exec. Order No. 12,335 of December 16, 1981, 46 Fed. Reg. 61,633 (1981) 3

H.R. Conf. Rep. No. 542, 98th Cong., 1st Sess. (1983), *reprinted in* 1983 U.S.C.C.A.N. 1619 7

Report of the National Commission of Social Security Reform (1983) 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1733

UNITED STATES OF AMERICA,

Petitioner,

v.

JUDGE TERRY J. HATTER, JR., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATUTORY PROVISION INVOLVED

The additional statutory provisions involved in this case, Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub. L. No. 98-168, 97 Stat. 1105 (1983), Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494 (1984), and Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986), are set forth in the Appendix to this brief.

The Appendix also sets forth 28 U.S.C. § 455 and 28 U.S.C.§ 2109.

COUNTER-STATEMENT OF THE CASE

The Constitution of the United States provides that the compensation of Article III judges "shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. This provision "is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary." *United States v. Will*, 449 U.S. 200, 217 (1980). For this reason, "there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation . . . ." *O'Donoghue v. United States*, 289 U.S. 516, 533 (1933).

Recognizing this duty, a group of sixteen Article III judges brought this action against the United States of America. The judges[1] claimed that the United States diminished their compensation in violation of Article III of the Constitution by enactment of the Tax Equity and Fiscal Responsibility Act of 1982 ("Tax Equity Act"), Pub. L. No. 97-248, 96 Stat. 324, the Social Security Amendments of 1983 ("1983 Amendments"), Pub. L. No. 98-21, 97 Stat. 65, and related statutes.[2]

1. In the early 1980s, Congress became concerned about the integrity of the Social Security system. The National Commission on Social Security Reform ("Greenspan Commission") was established by Congress to study this

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[1] References to the "judges" in this brief include the thirteen current federal judges in this case, one former federal judge, and the representatives of the estates of two deceased federal judges.

[2] These statutes collectively will be referred to as the "Social Security Amendments" or "Amendments."

problem and make recommendations about how to strengthen the system. *See* Exec. Order No. 12,335, 46 Fed. Reg. 61,633 (1981). At the time, over 90 percent of federal civilian employees, including federal judges, did not participate in the Social Security system.[3] The Greenspan Commission recommended that "all *newly hired* civilian employees of the Federal Government" should be added to Social Security to strengthen the program.[4] Congress accepted this recommendation, and the 1983 Amendments provided that federal civilian employees hired *after* December 31, 1983 would be subject to old age and survivors disability insurance ("OASDI") withholding.

Under the 1983 Amendments, the vast majority of the federal civilian employees hired before 1984 remained exempt from OASDI withholding.[5] The 1983 Amendments did, however, extend OASDI withholding to a small group of federal civilian employees that were elected, appointed or hired *before* January 1, 1984. Congress imposed immediate coverage on the President and Vice President, certain senior political appointees, members of Congress, certain legislative branch employees not already covered by CSRS, and sitting

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[3] Approximately 2.5 million of the 2.7 million federal civil employees in the United States did not participate in the Social Security system at the time of the 1983 Amendments. *See* Joint Stipulation ("Jt. Stip.") ¶ 19, Joint Appendix before the U.S. Court of Appeals for the Federal Circuit ("J.A.") at 96.

[4] Report of the National Commission on Social Security Reform at 2-7 (1983) ("Commission Report") (emphasis added).

[5] The Petition suggests that OASDI withholding, like hospital insurance ("HI") withholding, was extended to all existing federal civilian employees. Pet. 7. This is incorrect. While the Tax Equity Act made all existing federal civilian employees (including federal judges) subject to HI withholding, the 1983 Amendments specifically exempted the vast majority of such employees (but not federal judges) from Social Security withholding.

federal judges.[6] With the exception of federal judges, the group added under the 1983 Amendments consisted of political appointees or elected officials of the legislative and executive branches. In sum, less than one-half of one percent of the federal civilian workforce (or less than 12,500 employees) were mandatorily added to OASDI coverage as a result of the 1983 Amendments. Lynn Decl. ¶ 42(b), J.A. at 120-21.[7]

Congress' motivation to depart from the Greenspan Commission's recommendations, and to extend Social Security to existing elected officials and political appointees, is suggested by the dissenting views of Congressman Bill Archer to the Commission Report:

> [C]overage of only newly hired employees continues an inequity. Ironically, those now in Congress who must vote on the plan are themselves going to continue to be exempt from coverage. So will those presently employed by the federal government who will administer the changes.

Commission Report at Statement (6), page 2. Given this fact, Congress included itself and high level executive branch political officials in the 1983 Amendments as a symbolic act, signaling that they would "also have a vested interest in the future of the Social Security program." Lynn Decl. ¶ 42(b), J.A. at 120-21. Congress also extended Social Security to sitting Article III judges.

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[6] 42 U.S.C. § 410(a)(5)(C)-(G); *see generally* Jt. Stip. ¶ 29 & attached material, J.A. at 98, 104-06.

[7] The history the Social Security Amendments, and a careful analysis of the operation and effect of these statutes, is contained in the declaration of respondents' expert Peter R. Lynn, which was submitted by the judges in support of their motion for summary judgment. J.A. at 107-30.

2. At the time each judge in this case was appointed to the bench, their judicial salaries were *not* subject to withholding for Social Security coverage. Rather, Article III judges were (and remain) subject to special statutory retirement provisions that reflect their lifetime tenure. After meeting certain age and service requirements, an Article III judge may retire from active service (*i.e.*, assume senior status), but render service as he is able. In this event, the judge retains the salary of the office, including increases. 28 U.S.C. § 371(b). Alternatively, an Article III judge may retire from office and receive an annuity for the remainder of his lifetime equal to the judicial salary at the time of his retirement. 28 U.S.C. § 371(a). In addition, Article III judges have the option of contributing to the judicial survivors' annuity fund to provide for their survivors. 28 U.S.C. § 376.

Each judge in this case was appointed to his office by the President before January 1, 1983. It was on this date that Article III judges first became subject to the HI portion of Social Security withholding imposed by the Tax Equity Act, and on January 1, 1984, that judges first became subject to the OASDI portion of Social Security withholding imposed by the 1983 Amendments. *See* 42 U.S.C. § 410(a)(5), (p). Thus, in making the decision to accept a federal judicial appointment, each of the judges understood he would receive the statutory judicial income, calculated without deductions for Social Security. *See* Declarations of Judges, J.A. at 26-90. In addition, several took special note of, and relied specifically on, the savings that would result from the provision of statutory retirement benefits without Social Security deductions.[8]

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[8] *See, e.g.*, A.J. McNamara Decl., ¶ 3, J.A. at 45-46 (considered absence of Social Security deduction from judicial salary in calculating his ability to pay for college education of four children); Henry A. Mentz, Jr. Decl., ¶ 3, J.A. at 72-73 (absence of Social Security deduction

The result of the Social Security Amendments was that, for each year between 1984 and 1993, each of the judges saw his take-home pay reduced by an amount ranging from $2,532 to $5,321. In total, each judge had nearly $40,000 withheld from his compensation during the years 1983-1993. *Id.*

3. Congress recognized that the effect of the 1983 Amendments would be to subject federal civilian employees hired after January 1, 1984 to mandatory withholding for two different retirement programs (*i.e.*, Social Security and CSRS). In order to give these employees relief from dual withholding until a new federal retirement system could be created, Congress enacted the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 ("Adjustment Act"), Pub. L. No. 98-168, 97 Stat. 1106 (1983). Under the Adjustment Act, the total amount deducted from a new employee's salary was no greater than the amount withheld from an existing CSRS employee earning the same salary, even though the new employee was subject to both CSRS and Social Security. These new employees would eventually become subject to a new government retirement system, yet to be developed, and receive credit under that system for their interim service under CSRS. Adjustment Act § 207, 97 Stat. 1111, 5 U.S.C. § 8331 note at 995-96.

The Adjustment Act also included special provisions for the group of existing elected officials and appointees mandatorily added to Social Security on January 1, 1984. Congress recognized that "the rules [were] being changed in the middle of the game" for this group and provided them

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from judicial salary was a factor making judicial appointment attractive); Michael M. Mihm Decl., ¶ 3, J.A. at 79-80 (considered absence of Social Security deduction important in light of career in public service and family obligations).

with choices to harmonize their deductions for retirement programs. H.R. Conf. Rep. No. 542, 98th Cong., 1st Sess. 13 (1983) *reprinted in* 1983 U.S.C.C.A.N. 1625, 1628. The Conference Report on the Adjustment Act states:

> Unlike newly hired employees who may elect whether or not to accept Government employment and face the uncertainties of a yet-to-be-established supplemental retirement program, *the affected group has no election other than to resign* (which in many instances would involve resignations from elected offices, lifetime judicial appointments, or presidentially appointed and Senate-confirmed positions).

Id. (emphasis supplied).

In order to "mitigate [this] unfairness," *id.*, the Adjustment Act allowed most of those mandatorily added on January 1, 1984 to choose from three options: (1) to discontinue participation in the covered retirement system (usually CSRS) and receive a refund of previous contributions (resulting in Social Security coverage only); (2) to participate fully in both the covered retirement system and Social Security; or (3) to participate in both systems subject to the Adjustment Act interim offsets applicable to new employees. Adjustment Act § 208, 97 Stat. 1111-12, 5 U.S.C. § 8331 note at 997.

While the provisions of the Adjustment Act would appear to encompass Article III judges, in actuality they do not. Neither the retirement provisions of the Judicial Code nor the Judicial Survivor's Annuity Fund were defined as "covered retirement systems" within the meaning of the Adjustment Act. Consequently, Article III judges were not entitled to reduce, much less eliminate, the effect of Social Security withholding on their salaries. Political appointees and members of Congress, in contrast, received two separate

opportunities to do so — one under the Adjustment Act and a second under the Deficit Reduction Act, enacted several months after the 1983 Amendments took effect. The Deficit Reduction Act allowed the same elections as the Adjustment Act retroactive to January 1, 1984. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494 (1984), 5 U.S.C. § 8331 note at 994-95. *See* Lynn Decl. ¶¶ 21-31, J.A. at 113-16.

In 1986, Congress established a new Federal Employees Retirement System — "FERS" — which combined Social Security with a basic benefit and an optional savings plan. Federal Employees Retirement System Act of 1986 ("FERS Act"), Pub. L. No. 99-335, 100 Stat. 514, *codified at* 5 U.S.C. §§ 8401-8479. While participants in CSRS were given the option to join FERS, FERS Act § 301(a), 100 Stat. 599, 5 U.S.C. § 8331 note at 990-91, only four percent chose to do so. Jt. Stip. ¶ 26, J.A. at 97. Ninety-six percent of eligible employees opted to retain CSRS coverage only. *Id.* As a result, even with the turnover in federal employees that had occurred since 1984, the majority of civilian federal employees were not subject to Social Security as of September 1991. *Id.* at ¶ 23, J.A. at 97.

Under the FERS Act, the same group of existing employees added mandatorily to Social Security on January 1, 1984 that had been given the opportunity to make elections under the Adjustment Act and the Deficit Reduction Act was once again given a choice of several retirement options. FERS Act § 301(b), 100 Stat. 599-600, 5 U.S.C. § 8331 note at 991. These choices once again permitted the eligible employees to offset the economic effect of the added Social Security withholding. As before, however, Article III judges were not eligible to make any elections to reduce the amount withheld from their salaries as a result of the imposition of Social Security deductions. Lynn Decl. ¶¶ 32-40, J.A. 117-19.

4. On December 29, 1989, the judges initiated this action by filing a complaint in what was then the United States Claims Court. The complaint alleged, *inter alia*, that the Social Security Amendments unconstitutionally diminished their compensation and unconstitutionally discriminated against federal judges. On November 9, 1990, the Claims Court (Turner, J.) dismissed the judges' complaint for lack of subject matter jurisdiction. Pet. App. 53a-54a. On appeal, the court of appeals reversed and remanded the case for a hearing on the merits of the judges' damages action. *Id.* at 45a.

On remand, the parties conducted discovery and filed cross-motions for summary judgment. On June 22, 1994, the Court of Federal Claims granted the defendant's motion for summary judgment. *Id.* at 37a. Although the trial court acknowledged that the judges' compensation "has been reduced by Social Security taxes . . . at least in terms of take-home pay," it nonetheless rejected the judges' claims on the basis of a four-step analysis. *Id.* at 23a.

First, finding that *Evans v. Gore*, 253 U.S. 245 (1920) had, in effect, been overruled *sub silentio*, the court held that the compensation of sitting Article III judges may be lawfully diminished through the imposition of a new tax. *Id.* at 24a-27a.

Second, the court held that the compensation of sitting judges may be lawfully diminished through the imposition of a tax from which those judges had been previously exempt, even when the economic effect of doing so is to make it relatively more attractive for sitting judges to leave the bench and return to private life. *Id.* at 27a-30a.

Third, the court characterized the diminution in question as an "indirect" diminution in compensation. *Id.* at 20a-22a. According to the court, "direct" diminutions (*i.e.*, reductions in statutory salaries) are always unconstitutional, while an

"indirect" diminution is unconstitutional only if a judge can demonstrate that it is the product of "legislative intent to influence the judiciary," a showing that the judges in this case did not make. *Id.* at 22a.

Finally, while acknowledging that "generally, Congress reduced or offset the contribution federal employees were required to make to their retirement plan by the amount of any newly required Social Security tax," *id.* at 33a, the court rejected the judges' contention that the Adjustment Act, the Deficit Reduction Act and the FERS Act discriminated against judges by failing to provide them the same elections as other federal employees. The court concluded that this disparate treatment of sitting Article III judges was constitutional because it did not reflect a demonstrated intent on the part of Congress to influence the judiciary. *Id.* at 34a-35a.

5. On August 30, 1995, the court of appeals reversed, holding that the Social Security Amendments diminish the compensation of Article III judges who took office prior to the enactment of the Amendments. *Id.* at 6a-7a. The court began by noting that the Compensation Clause "protects one of the most remarkable innovations" of the Constitution: the creation of a judicial branch sufficiently independent to enforce constitutional limits on the executive and legislative branches. *Id.* at 3a-5a. In furtherance of that goal and the goal of attracting good and competent individuals to the bench, "the Framers adopted an unrestricted protection for judicial compensation." *Id.* at 4a.

The court of appeals held that *Evans v. Gore*, 253 U.S. 245 (1920), controlled the case and that where federal law did not charge plaintiffs with the duty of paying the tax in question when they first assumed office (as in *Evans*), the subsequent imposition of the tax impermissibly reduced their salaries. *Id.* at 6a. The decision in *O'Malley v. Woodrough*, 307 U.S. 277 (1939) did not affect the analysis, since the claimant judge in that case had taken office after Congress

had made the taxes in question applicable to judges' salaries; thus, the "judicial claimants had suffered no diminishment in compensation after taking office." Pet. App. at 7a.

Based upon its review of the proceedings of the Constitutional Convention, the court of appeals also concluded that "compensation" under Article III was not limited merely to statutory salary and that compensation can be "diminished" within the meaning of the Compensation Clause "regardless of the intent or target of the reduction." *Id.* at 8a. The Convention sought to prevent the intrusions into judicial independence that could result if judges were required to approach the legislative or executive branches on matters affecting compensation. *Id.* at 9a. The court, therefore, rejected the Government's attempts to limit the reach of the Clause to "direct" diminutions, or to impose a requirement that claimant judges prove that Congress intended an attack on the judiciary's independence. *Id.* at 8a-11a.

The court of appeals did not reach the judges' independent contentions that the Adjustment Act, the Deficit Reduction Act and the FERS Act discriminated against judges by failing to provide them the same opportunities to avoid the economic impact of Social Security taxes as was provided to all other federal employees mandatorily required to pay those taxes. The court of appeals remanded for calculation of the amounts owed the judges in damages. *Id.* at 13a.

REASONS FOR DENYING THE WRIT

This case does not warrant further review for three reasons. First, the court of appeals was clearly correct in concluding that the diminution in judicial compensation at issue here falls within the proscriptions of the Compensation Clause. Second, although the court of appeals did not reach the issue, the undisputed facts of record demonstrate that the Social Security Amendments diminished judicial compensa-

tion in a discriminatory manner; there is no dispute that a discriminatory diminution in judicial compensation is unconstitutional. Third, the court of appeals' decision is consistent with the purpose of the Compensation Clause and this Court's decisions under the Clause; the only effect of denying the petition will be to permit a limited class of Article III judges to recover damages for the unconstitutional diminution in their compensation.

I. THE RULING BELOW WAS CLEARLY CORRECT

There is no dispute that the Social Security Amendments, in fact, diminished the compensation of Article III judges. The court of appeals found that the "Social Security taxes diminished the claimants' salaries by specific amounts," Pet. App. 12a, and the Government does not challenge this finding. The question addressed by the courts below, and raised by the Government in its petition, is whether the diminution of compensation at issue here "is of the type forbidden by the Compensation Clause." Pet App. 23a. As the history and purpose of the Compensation Clause and long-standing precedent make clear, the answer to this question is yes.

1. The purpose of Article III, Section 1 of the Constitution is to ensure that the judicial branch is both competent and independent. *United States v. Will*, 449 U.S. 200, 217-18 (1980). Article III's dual guarantee of a lifetime appointment and protection from reduction in compensation is crucial to maintaining the independence of the judiciary, without which our system of checks and balances cannot function. In *The Federalist* No. 79, Alexander Hamilton explained:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general

> course of human nature, *a power over a man's subsistence amounts to a power over his will.*

The Federalist No. 79, at 472 (Clinton Rossiter ed., 1961) (emphasis is in original). By prohibiting the executive and legislative branches from exercising "control over the tenure and compensation of judges," Article III, Section 1 guarantees that the judiciary is "truly independent" and "free of improper influence from other forces within government." *Will*, 449 U.S. at 218.

The guarantees of Article III also serve to increase the stature and competence of the federal judiciary. In *Will*, this Court emphasized that the Compensation Clause:

> [E]nsures a prospective judge that, in abandoning private practice — more often than not more lucrative than the bench — the compensation of the new post will not diminish. Beyond doubt, such assurance has served to attract able lawyers to the bench and thereby enhance[d] the quality of justice.

449 U.S. at 221 (citing *Evans v. Gore*, 253 U.S. 245, 253 (1920); 1 J. Kent, *Commentaries on American Law* 276 (1826)).

2. The court of appeals correctly concluded that the statutes at issue in this case diminish compensation in a manner that is inconsistent with both the language and the purpose of Article III, Section 1. Because the Framers "considered judicial independence a core value of the Constitution," they "adopted a broad protection for it" in the form of the Compensation Clause. Pet. App. 10a. The Clause, as this Court observed in *Evans*, "contains no excepting words and appears to be directed against all diminution, whether for one purpose or another." 253 U.S. at 255. The language of the Clause thus plainly encompasses diminutions that result from the imposition of taxes on the

compensation of *sitting* Article III judges. This is the central holding of *Evans*.

As the court of appeals explained, the holding in *Evans* follows ineluctably from the purposes of the Clause. Pet. App. 7a, 9a-11a. The imposition of a new tax on the compensation of sitting Article III judges threatens both the independence and competence of the judicial branch in exactly the same manner as a diminution in the statutory salary. Both diminutions "withhold or take from the judge a part of that which has been promised by law for his services." *Evans*, 253 U.S. at 254. The ability to impose a new tax on sitting judges, like the ability to reduce their statutory salaries, makes the judges economically dependent on the other branches of government and undermines the incentive of "able lawyers to [join] the bench." *Will*, 449 U.S. at 221.

The same cannot be said with respect to judges who are appointed after the tax at issue is enacted. First, the language of the Compensation Clause provides that judges' compensation "shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1 (emphasis supplied). When a tax has been imposed on judicial compensation before a judge takes office, there is, by definition, no diminution in compensation during the judge's "Continuance in Office." Second, in these circumstances, there is no threat to judicial independence or competence. As the court of appeals explained, for judges who are appointed after a new tax is enacted, the tax is simply "a pre-existing obligation factored into [those] judges' compensation." Pet. App. 7a. It does not reduce the compensation "which has been promised by law for his services." *Evans*, 253 U.S. at 254.

The Court lost sight of this fundamental distinction in *Miles v. Graham*, 268 U.S. 501, 509 (1925), when it held that the Compensation Clause prohibited the imposition of a general federal income tax law on judges who assumed office *after* the tax became law. In reaching this conclusion, the

Court relied on *Evans*, which contained reasoning that was far broader than necessary to support its central holding. *See* Pet. 20-21. Indeed, as this Court observed in *Will*, the broad rationale of *Evans* suggests that the Compensation Clause "erect[s] an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges." 449 U.S. at 227.

The Court criticized the broad rationale of *Evans*, and expressly overruled the holding of *Miles*, in *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939). Like *Miles*, *O'Malley* involved a challenge to a federal income tax statute by a judge who was appointed to the court of appeals after the tax in question was enacted. The Court held that it would "trivialize the great historic experience on which the framers based the safeguards of Article III, § 1" to hold that "a non-discriminatory tax laid generally on net income" threatens "the independence of judges *who took office after Congress*" enacted the tax. *Id.* (emphasis supplied).

While the *O'Malley* Court criticized the broad reasoning of *Evans*,[9] it did not overrule the holding of that case. *Id.* at 281-82. Nor did the *Will* Court. 449 U.S. at 227. The lower courts, including the court of appeals here, have had no difficulty understanding that "in overruling *Miles v. Graham* and leaving *Evans v. Gore* standing, [the Court] obviously

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[9] The commentators at the time focused their criticism on the *Evans* Court's use of the intergovernmental tax immunity doctrine, which, as the Government notes, has since been disapproved. Pet. 20. They did not, by and large, criticize the holding of *Evans*. Moreover, contrary to the statement in *O'Malley* that *Evans* "was rejected by most of the courts before whom the matter came after that decision," the fact is that many states have adopted the *Evans* rule as a matter of state constitutional law. *See Commonwealth ex rel. Hepburn v. Mann*, 5 Watts & Serg. 403 (Pa. 1843); *Long v. Watts*, 183 N.C. 99, 110 S.E. 765 (1922); *In re Opinions of the Justices*, 225 Ala. 502, 144 So. 111 (1932); *Gordy v. Dennis*, 176 Md. 106, 5 A.2d 69, 82 (1939).

meant to let the decision in the latter case rest upon its own facts." *Baker v. Commissioner*, 149 F.2d 342, 343 (4th Cir.), *cert. denied*, 326 U.S. 746 (1945). *See also Atkins v. United States*, 556 F.2d 1028, 1044 (Cl. Ct. 1977) (*O'Malley* "by force of reasoning overruled *a good deal* of *Evans*") (emphasis supplied), *cert. denied*, 434 U.S. 1009 (1978).

3. This case illustrates why the central holding of *Evans* should not, as the Government urges, be reversed. When the judges in this case were appointed to the bench, each compared his compensation in private life, which already reflected Social Security withholding, to his prospective compensation as a judge, which included no diminution for Social Security withholding. Declarations of Judges, J.A. at 26-90. Based on a comparison of these two amounts, each judge accepted his appointment. *Id.* The Social Security Amendments significantly and adversely altered this economic calculus: they not only diminished the judges compensation, but they did so in a way that made the judicial office *relatively* less attractive. In other words, the statutes affected only one side of the economic scale on which the judge weighed his decision to accept appointment to the bench. Congress expressly recognized this fact, observing that individuals holding "lifetime judicial appointments" when these amendments were passed had no way to avoid the diminution in compensation "other than to resign." *See* 7, *supra*.

The effect of the Social Security Amendments, in short, is no different in constitutional terms than a reduction in the statutory salaries of Article III judges or, indeed, the imposition of a tax solely on the salaries of Article III judges. Each diminishes the compensation that was promised to sitting judges when they decided to accept their appointments to the bench, and thereby encourages them to return to private life. As the court of appeals recognized, this is precisely the sort of economic threat to judicial independence

and competence that the Compensation Clause was designed to prevent.

4. The Government quarrels with this conclusion, arguing that "[t]his Court's more recent decisions," do not support the view that the imposition of a nondiscriminatory tax on judicial compensation violates the Compensation Clause "even in the case of judges appointed before the tax took effect." Pet. 21. The only case that squarely addresses this issue, however, is *Evans*.

The Government draws support for its argument principally from the Court of Claims' opinion in *Atkins*, in which the court held that Congress' failure to *increase* judicial salaries to keep pace with inflation did not constitute a "diminution" in compensation within the meaning of the Compensation in Clause. *See* Pet. 22-23. Despite the palpable difference between *Atkins* and this case, the Government relies upon *dicta* from *Atkins* to bolster its contention that a diminution in compensation is unconstitutional only when it is a 'financially based attack on judicial independence,' and the product of 'a plan fashioned by the political branches . . . ineluctably operating to punish the judges *qua* judges, or to drive them from office.' *Id.* (quoting *Atkins*, 556 F.2d at 1054).

While the Framers undoubtedly wished to prevent such "attacks" on the Judiciary, the mechanism they chose to accomplish this end was a broad prohibition on any diminutions in judicial compensation. *Cf. United States v. IBM Corp.*, 64 U.S.L.W. 4419, 4424 (U.S. June 10, 1996) (the "broad language of the [Export] Clause" cannot be read to prohibit only "discriminatory taxes"; the "Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all"). Indeed, after the Claims Court decision in *Atkins*, this Court in *Will* struck down Congress' rescission of certain cost-of-living increases for judges despite the fact that the judges made no argument that

the rescissions in question were the product of a plan by the political branches to punish Article III judges, nor amounted to a financially based attack on judicial independence.

The irony of the Government's position is that if Congress truly wished to attack the independence of Article III judges by diminishing their compensation, what better way to accomplish this end than by extending to them a tax from which they were previously exempt. After all, a reduction in statutory salaries would not survive judicial challenge in light of *Will*; nor, in all likelihood, would a tax levied solely on the salaries of Article III judges. The extension of a tax from which judges had been previously exempt (in this case, exempt for nearly 50 years), however, would achieve two ends: it would make the judicial office relatively less attractive to those already holding it, while simultaneously preserving the appearance of legislative evenhandedness. The court of appeals correctly concluded that the extension of OASDI and HI taxes to sitting Article III judges is inconsistent with both the language and purpose of the Compensation Clause. There is no reason for this Court to review that judgment.

II. THE RULING BELOW IS INDEPENDENTLY SUSTAINABLE ON THE GROUND THAT THE STATUTES AT ISSUE DIMINISHED JUDICIAL COMPENSATION IN A DISCRIMINATORY MANNER

Although a showing of discrimination is not necessary to prove a violation of the Compensation Clause, *see Will*, 449 U.S. at 226 (the Clause "makes no exception for 'non-discriminatory' reductions"), there is no dispute that the Compensation Clause prohibits a statute that imposes a different and greater economic burden on Article III judges. *See O'Malley*, 307 U.S. at 282. If Congress enacts a statute that divides people into financially-advantaged and disadvantaged classes, and places Article III judges into the

financially-disadvantaged category, there will be an inevitable incentive for judges either (1) to seek to induce Congress to place them in the more favored class, or (2) to resign from office because the terms of the economic trade-offs they made when they accepted their appointments have been changed. The incentives created by this discrimination are, quite plainly, no different than the incentives that would result from a reduction in the statutory salary. Although the court of appeals did not reach the issue, the stipulated facts of record demonstrate that the Social Security Amendments and subsequent legislation diminished the compensation of Article III judges in a discriminatory manner.

1. The Social Security Amendments discriminated against Article III judges in that they imposed on those judges a new tax burden that was not borne by millions of working Americans. According to stipulated Social Security Administration data, 17.1 percent of the labor force (excluding the Armed Forces) was *not* subject to Social Security deductions as of December 1983, a figure which declined to 14.1 percent (*i.e.*, approximately 8 million employees) a year later after adoption of the 1983 Amendments. Jt. Stip. ¶¶ 18, 27, Table 4, J.A. at 95-96, 98, 100. Thus, unlike the income tax statutes at issue in *Evans* and *O'Malley*, Social Security taxes are not a duty that judges "share[] with all other[] [citizens]." *Evans*, 253 U.S. at 265 (Holmes, J., dissenting).

2. The statutes at issue also discriminated against sitting Article III judges in comparison to other federal employees. From the establishment of the Social Security system until the adoption of the 1983 Amendments, relatively few employees of the United States Government were covered by Social Security because old age, survivors, and disability benefits were already provided to these employees under existing publicly-financed systems established by Congress. Likewise, as the Government acknowledges, Article III judges were

excluded because "judges were (and are) covered by another retirement system established by 28 U.S.C. § 371." Pet. 5 n.1. According to Office of Personnel Management (OPM) estimates, as of September 1983, only 207,155 civilian federal employees (or 7.6 percent of the total) were covered by Social Security, while 2,503,914 civilian federal employees (or 92.4 percent of the total) were not subject to Social Security. Jt. Stip. ¶ 19, J.A. at 96.

The 1983 Amendments did not require OASDI coverage for the overwhelming majority of federal employees who, like the plaintiffs, were hired before 1984. Indeed, as of September 1984, only 13 percent of civilian federal employees (excluding postal service employees) — a total of only 268,006 employees — had become participants in OASDI coverage (including, of course, post-1983 new hires). *Id.* at ¶ 22, J.A. at 97. Even as of September 1991, after almost eight years of post-1983 new hires, the majority of civilian federal employees were still not subject to OASDI. *Id.* at ¶ 23, J.A. at 97. These figures reflect the fact that although pre-1984 federal employees were eligible to transfer to the new FERS system, which would subject them to Social Security coverage and withholding, only four percent elected to do so. An overwhelming 96 percent of eligible pre-1984 federal employees opted to retain their old non-Social Security retirement system. *Id.* at ¶ 26, J.A. at 97. Article III judges were discriminated against because they were not given this option.

3. In a series of statutes — the Adjustment Act, the Deficit Reduction Act and the FERS Act — Congress repeatedly discriminated against federal judges, denying them financial benefits and elections that it granted to other federal employees, including those mandatorily included in Social Security under the 1983 Amendments. As a result, federal judges *alone* had no choice but to bear the full economic

effect of having OASDI taxes withheld from their compensation.

a. After passing the 1983 Amendments, it became apparent to Congress that the increased financial burdens on federal employees would be considerable, since most new federal employees would be covered by the applicable federal retirement system as well as paying into OASDI. *See* Lynn Decl. ¶¶ 19-20, 43-44, J.A. at 112-13, 121-22. The Adjustment Act sought to deal with the problem in two ways. First, it lowered the payment by new federal employees for CSRS or other "covered retirement system" by the 5.7 percent of salary that would now have to be contributed to OASDI ("the interim offsets"). As a result, the typical CSRS contribution was lowered from 7.0 percent of salary to 1.3 percent of salary. *Id.* Second, it provided the small number of senior employees who were mandatorily covered by Social Security with a special election of retirement programs that permitted them to choose by December 31, 1983 whether to supplement Social Security with full CSRS coverage, take advantage of the interim offsets, or avoid CSRS coverage altogether. *Id.* at ¶¶ 21-26, J.A. at 114-15.

Neither the interim offsets nor the special elections were available to Article III judges. Thus, they were disadvantaged compared to both new federal employees and the other senior officials in the group added mandatorily to Social Security. In fact, Article III judges were the only federal employees newly covered by Social Security who were not eligible for these benefits, and consequently forced to pay increased retirement withholding. *See* Lynn Decl. ¶¶ 16, 27, J.A. at 111-12, 115.

b. The Deficit Reduction Act gave senior officials who were eligible to make the special elections under the Adjustment Act a second opportunity to make those elections. These officials were again allowed to elect the interim offsets or to opt out of CSRS entirely and thus to

avoid a net increase in out-of-pocket retirement expenditures, even with the addition of OASDI withholding. Again, however, federal judges were not provided with an election that would permit them to avoid the increase in total withholding due to OASDI. *See* Lynn Decl. ¶¶ 28-31, J.A. at 115-16.

c. In 1986, Congress finally replaced its "interim plan" by establishing the new FERS retirement system for most civilian federal employees hired after December 31, 1983. The FERS Act continued the pattern of discrimination against Article III judges. Rather than placing all persons covered by the CSRS interim plan under FERS, the FERS Act excluded from mandatory FERS coverage employees who, as of December 31, 1986, had at least five years of creditable service under CSRS. Instead, these employees were eligible for "CSRS Offset," which provided retirement cost reductions similar to the interim offsets under the Adjustment Act and the Deficit Reduction Act. As a result, they had the option to avoid entirely any net out-of-pocket expenditure for OASDI. No federal judge was eligible for this benefit because none had been permitted to elect CSRS at any point in time (although all but one of the judges in this case had been in federal service for five years as of December 31, 1986). *See* Lynn Decl. ¶¶ 32-40, J.A. 117-19.

In addition, the FERS Act provided special advantages for the government officials (other than judges) who were added to Social Security. It excluded from mandatory FERS coverage all senior officials who had been eligible for special election opportunities under the Adjustment Act and the Deficit Reduction Act and who had served continuously as senior officials from December 31, 1983. These senior officials were also eligible under the FERS Act for CSRS Offset, with the result that they could, once again, choose to avoid net out-of-pocket expenditure for OASDI. Again, however, Article III judges were not eligible; they did not

have the prerequisite special election opportunities under the Adjustment Act or the Deficit Reduction Act. *Id.* Federal judges, as a result, had no alternative that would allow them to avoid the extra cost of OASDI withholding from their compensation. The FERS Act thus clearly discriminated against the judges in that it imposed a substantial financial burden that was not required to be borne by any other federal employee.

4. The taxes imposed on sitting federal judges by the statutes at issue are not, in short, taxes "of general, non-discriminatory application to all earners of income." *O'Malley*, 307 U.S. at 280. Millions of working Americans were exempt from these taxes in 1983 and remain exempt today. Moreover, in extending these taxes to Article III judges, Congress did so in a manner that imposed a far greater economic burden on the judges than on any other federal employees. This discrimination renders the statutes at issue here unconstitutional under the Compensation Clause.

III. THE RULING BELOW HAS LIMITED PRECEDENTIAL AND REMEDIAL IMPLICATIONS

1. The petition suggests that the court of appeals' decision "has significance well beyond" the facts of this case. Pet. 14. This is difficult to see. In more than 200 years of constitutional interpretation, this is only the second case to raise before this Court the issue of whether the Compensation Clause prohibits the imposition of a tax on sitting Article III judges. Because the court of appeals' decision affects, at most, only those Article III judges who accepted their appointments prior to January 1, 1984, the remedial implications of the decision are of limited scope and duration. Indeed, Congress could readily cure the constitutional defect in a number of different ways, including an amendment that would give Article III judges the same options it gave other federal employees to participate in the Social Security and

Medicare programs as a supplement to their existing retirement system.

2. The Government argues that review is nevertheless appropriate because the reasoning of the court of appeals' decision suggests that "Congress would have to freeze the income tax rate, deductions, and credits applicable to every federal judge (insofar as the tax fell on the judge's salary) at the moment that each judge took office." Pet. 24. In the 75 years since *Evans v. Gore* was decided, this claim has never been made, and the court of appeals' decision lends no support to such a claim. The distinction between *O'Malley* and *Evans*, as the court observed, is that a judge who is appointed *after* a tax is enacted accepts the appointment with knowledge that the specified compensation will be subject to the tax. Pet App. 7a. Indeed, in *O'Malley*, the Court emphasized that the income tax statute "gave notice to all judges thereafter to be appointed, of the new Congressional policy to include the judicial salaries of such judges in the assessment of income taxes." 307 U.S. at 279. A judge who accepts an appointment subject to a tax necessarily accepts the prospect that the rate of tax may change. Unless a tax rate is changed in a discriminatory manner with respect to Article III judges, the change will apply equally to judicial compensation and private compensation, and will pose no potential threat to judicial independence or competence. The court of appeals' decision does not hold otherwise.

THE DISQUALIFICATION ISSUE

The Government raised, in a nearly two-page footnote, the issue of "whether some of the members of this Court are disqualified from hearing and deciding this case." Pet. at 25-26 n.12. Respondents agree that this issue is squarely presented by this case. Whether one or more Justices is disqualified from hearing this case because he or she "has a financial interest in the subject matter in controversy ... or any other interest that could be substantially affected by the

outcome of the proceeding" is, of course, for each Justice to decide. 28 U.S.C. § 455(b)(4). In this section we discuss a number of factual and legal issues that are relevant to this judgment, and respond to the arguments set forth in the petition.

1. The judicial disqualification statute contains two different provisions that may apply in this case. First, the statute requires disqualification where a Justice "has a financial interest in the subject matter in controversy." 28 U.S.C. § 455(b)(4). The statute defines "financial interest" to mean "ownership of legal or equitable interest, however small." 28 U.S.C. § 455(d)(4). *See also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859 n.8 (1988) ("§ 455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates appearance of impropriety.") Second, even if there is no financial interest in the subject mater in controversy, the statute requires disqualification where a Justice has "any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4).

These provisions are relevant here because a Justice who is eligible to recover damages for the diminution in compensation resulting from the imposition of Social Security taxes may, as the Government observes, "sue in the Court of Federal Claims and gain the benefit of the court of appeals' decision in this case." Pet. 15. *See also* Pet. 25 n.12 (a Justice "eligible to receive refunds of the taxes challenged in this case ... arguably would have 'a financial interest in the subject matter in controversy,' that would require disqualification under 28 U.S.C. 455(b)(4).").

2. The Government correctly observes that any eligible Article III judge who files a new lawsuit seeking damages for the diminution in compensation resulting from the imposition of Social Security taxes will be limited in the amount of his or

her claim by the statute of limitations. Although the Government repeatedly denominates the judges' claim in this case as one for "tax refund," it is in fact (as the Government acknowledges elsewhere in the petition) a claim for damages. *Compare* Pet. 9, 25 n.12 (claim for refund) *with* Pet. 10 (claim for damages). Indeed, the Government initially obtained dismissal of the judges' damages action on the ground that it was "a tax refund suit over which the Claims Court ... lacks subject matter jurisdiction because the plaintiffs failed to file an administrative claim for refund." Pet. App. 49a. The court of appeals reversed, however, finding that the judges had stated a claim for damages under the Compensation Clause and the Tucker Act, 28 U.S.C. § 1491(a)(1). Pet. App. 41a, 45a. The Government has not sought review of this decision.

Thus, contrary to the Government's contention (Pet. 25 n.12), the six-year statute of limitations for damages, 28 U.S.C. § 2401(a), not the shorter statute applicable to tax refund claims, 28 U.S.C. § 6511(a), would apply to a judge's claim for damages resulting from the unconstitutional diminution in his or her compensation as a result of the Social Security Amendments. Under the applicable statute of limitations, a civil action is barred "unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). In this case, the withholding of Social Security taxes is a continuing violation of the Constitution, and a new cause of action accrues every time the taxes at issue are withheld from an eligible judge's compensation. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). A judge who files suit in 1996, therefore, would be entitled to seek damages for any diminution in his or her compensation that would have occurred during the preceding six years.

3. For the reasons discussed in Section I, many Article III judges are simply not eligible to obtain relief under

the court of appeals' decision. For example, any Article III judge who was first appointed to the bench after January 1, 1984 is not eligible to obtain relief because the appointment occurred after the statutes at issue took effect.

Likewise, an Article III judge who was first appointed to the federal bench before January 1, 1984, but accepted a new appointment after January 1, 1984, could not collect damages for the period following the new appointment. This was the situation the Court faced in *O'Malley*, where Judge Woodrough, a circuit court of appeals judge, had been appointed to the district court before the tax at issue was passed, but was elevated to the court of appeals after the tax was passed (and sought a refund of income taxes paid three years after his second appointment). The Court held that the prior appointment to the district court was "wholly irrelevant to the matter in issue." 307 U.S. at 279-80. The Court reasoned that "[t]he two offices have different statutory origins, are filled by separate nominations and confirmations, and enjoy different emoluments. A new appointee to a circuit court of appeals occupies a new office no less when he is taken from the district bench than when he is drawn from the bar." *Id.* at 280.

Three examples illustrate how these constitutional principles interact with the applicable statute of limitations in this case. (1) A judge who was appointed to an Article III court before January 1, 1984, and filed suit in 1996, would be entitled to damages under the court of appeals' decision for the period 1990 through 1996. (2) A judge who was appointed to an Article III court before January 1, 1984, but was then appointed to another court before 1990, would be barred from bringing a claim under the court of appeals' decision by the statute of limitations. This is because the judge's only cognizable damage occurred during the term of his or her first appointment — a period that is outside of the statute of limitations. (3) A judge who was appointed to an

Article III court before January 1, 1984, and was then appointed to another court during the six years preceding the filing of his or her lawsuit would be able to collect some damages under the court of appeals' decision. The damages period would begin six years prior to the filing of the complaint and end on the date of the second appointment. Thus, a judge whose second appointment occurred on July 1, 1994, and who filed suit July 1, 1996, would be entitled to recover damages for the period July 1, 1990 through July 1, 1994.

4. The Government contends that claims for damages that fall within the statute of limitations are nevertheless precluded by the enactment of increases in the stated salaries of Article III judges since 1983 (as those increases cumulatively are greater than the HI and OASDI taxes deducted during that period). The Government is wrong that a general salary increase, not tied to the diminution caused by HI and OASDI taxes, precludes the claims at issue in this case. This contention was implicitly rejected in *Will*, where the unconstitutional diminution found to have occurred in "year 1" (which was an average of 4.8 percent of salary) was more than overcome by the subsequent increase in judges' salaries in "year 4" (an average of 10.41 percent). *See* 449 U.S. 205-06, 208-09, 224-26. Moreover, this contention (although litigated below) is not before this Court since it was not raised by the question presented nor was it raised by the Government as a reason why the petition should be granted.

5. Finally, Respondents do not agree with the Government's contention that the Rule of Necessity applies to this case. As this Court explained in *Will*, the Rule of Necessity comes into play only in cases in which "all Article III judges have an interest in the outcome." 449 U.S. at 212. The purpose of the rule is to ensure that, in these unusual circumstances, the litigants are not "denied their right to a forum." *Id.* at 217.

The Rule of Necessity does not apply here because, for the reasons explained above, many federal judges have no financial (or other disqualifying) interest in this case. In the proceedings below, the trial judge was an Article I judge, and each of the three court of appeals' judges was appointed to the bench after January 1, 1984. Indeed, nine of the eleven judges currently sitting as active judges on the U.S. Court of Appeals for the Federal Circuit were appointed to the bench after January 1, 1984. No party raised the disqualification issue below, nor argued that the Rule of Necessity applied, because the judges who heard this case had no disqualifying interest in the matter.

The Government now contends, however, that the Rule of Necessity "arguably" applies because the court of appeals' decision establishes a precedent that "may ... affect Congress's authority in the future to impose new taxes on judicial salaries," or to take other actions. Pet. 26 n.12. If this is so, then the judicial disqualification statute sweeps very broadly indeed. For example, under the Government's reasoning, no judge who owns securities could decide the legal questions presented by a securities case because the precedent established might affect the value of his or her securities in some future case decided by another court. Such a contingent and speculative "interest" has never been held by this Court to require disqualification under Section 455.

To be sure, if four or more members of this Court disqualify themselves from hearing this case, the Court will lack a quorum. 28 U.S.C. § 1. But that does not mean that the Rule of Necessity applies. There is, after all, no requirement that the Court hear this case. Indeed, Congress has expressly provided for the possibility that disqualifications might deprive the Court of a quorum. Under 28 U.S.C. § 2109, if this Court lacks a quorum, and "a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the

court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court." *See, e.g., Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983); *Arizona v. United States District Court of Arizona*, 459 U.S. 1191 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

FEDERAL EMPLOYEES' RETIREMENT CONTRIBUTION TEMPORARY ADJUSTMENT ACT OF 1983

5 U.S.C. § 8331 note

FEDERAL EMPLOYEES' RETIREMENT CONTRIBUTION TEMPORARY ADJUSTMENT

Pub. L. 98-168, title II, Nov. 29, 1983, 97 Stat. 1106, as amended Pub. L. 99-190, § 147, Dec. 19, 1985, 99 Stat. 1324; Pub. L. 99-335, title III, §§ 305(a), 309, June 6, 1986, 100 Stat. 606, 607, provided that:

"SHORT TITLE

"Sec. 201. This title may be cited as the 'Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983'.

"STATEMENT OF POLICY

"Sec. 202. It is the policy of the Government–

"(1) that the amount required to be contributed to certain public retirement systems by employees and officers of the Government who are also required to pay employment taxes relating to benefits under title II of the Social Security Act [42 U.S.C. 401 et seq.] for service performed after December 31, 1983, be modified until the date on which such employees and officers are covered by a new Government retirement system (the design, structure, and provisions of which have not been

determined on the date of enactment of this Act [Nov. 29, 1983]), or January 1, 1987, whichever is earlier;

"(2) that the Treasury be required to pay into such retirement systems the remainder of the amount such employees and officers would have contributed during such period but for the temporary modification;

"(3) that the employing agencies make contributions to the retirement systems with respect to such service in amounts required by law in effect before January 1, 1984, without reduction in such amounts;

"(4) that such employees and officers accrue credit for service for the purposes of the public retirement systems in effect on the date of enactment of this Act [Nov. 29, 1983] until a new Government retirement system covering such employees and officers is established;

"(5) that, where appropriate, deposits to the credit of such a retirement system be required with respect to service performed by an employee or officer of the Government during the period described in clause (1), and, where appropriate, annuities be offset by the amount of certain social security benefits attributable to such service; and

"(6) that such employees and officers who are first employed in civilian service by the Government or first take office in civilian service in the Government on or after January 1, 1984, become subject to such new Government retirement system as may be established for employees and officers of the Government on or after January 1, 1984, and before January 1, 1987, with credit for service performed after December 31, 1983, by such employees and officers transferred to such new Government retirement system.

"DEFINITIONS

"Sec. 203. (a) For the purposes of this title–

"(1) the term 'covered employee' means any individual whose service is covered service;

"(2) the term 'covered retirement system' means–

"(A) the Civil Service Retirement and Disability System under subchapter III of chapter 83 of title 5, United States Code;

"(B) the Foreign Service Retirement and Disability System under chapter 8 of the Foreign Service Act of 1980 (22 U.S.C. 4041 et seq.);

"(C) the Central Intelligence, Agency Retirement and Disability System under the Central Intelligence Agency Retirement Act of 1964 for Certain Employees (50 U.S.C. 403 note); and

"(D) any other retirement system (other than a new Government retirement system) under which a covered employee who is a participant in the system is required to make contributions to the system in an amount equal to a portion of the participant's basic pay for covered service, as determined by the President.

"(3) the term 'covered service' means service which is employment for the purposes of title II of the Social Security Act [42 U.S.C. 401 et seq.] and chapter 21 of the Internal Revenue Code of 1986 [26 U.S.C. 3101 et seq.] by reason of the amendments made by section 101 of the Social Security Amendments of 1983 (97 Stat. 67) [amending section 3121 of Title 26, Internal Revenue Code, and sections 409 and 410 of Title 42, The Public Health and Welfare, and enacting provisions set out as

notes under section 3121 of Title 26 and section 410 of Title 42]; and

"(4) the term 'new Government retirement system' means any retirement system which (A) is established for officers or employees of the Government by or pursuant to a law enacted after December 31, 1983, and before January 1, 1987, and (B) takes effect on or before January 1, 1987.

"(b) The President shall publish the determinations made for the purpose of subsection (a)(2)(D) in an Executive order.

"CONTRIBUTION ADJUSTMENTS

"Sec. 204. (a) In the case of a covered employee who is participating in a covered retirement system, an employing agency shall deduct and withhold only 1.3 percent of the basic pay of such employee under–

"(1) section 8334 of title 5, United States Code;

"(2) section 805 of the Foreign Service Act of 1980 (22 U.S.C. 4045);

"(3) section 211 of the Central Intelligence Agency Retirement Act of 1964 for Certain Employees (50 U.S.C. 403 note); or

"(4) any provision of any other covered retirement system which requires a participant in the system to make contributions of a portion of the basic pay of the participant;

for covered service which is performed after December 31, 1983, and before the earlier of the effective date of a new Government retirement system or January 1, 1987. Deductions shall be made and withheld as provided by such provisions in the case of covered service which is performed

on or after such effective date or January 1, 1987, as the case may be, and is not subject to a new Government retirement system.

"(b) Employing agencies of the Government shall make contributions with respect to service to which subsection (a) of this section applies under the second sentence of section 8334(a)(1) of title 5, United States Code the second sentence of section 805(a) of the Foreign Service Act of 1980 (22 U.S.C. 4045(a)), the second sentence of section 211(a) of the Central Intelligence Agency Retirement Act of 1964 for Certain Employees (50 U.S.C. 403 note), and any provision of any other covered retirement system requiring a contribution by the employing agency, as if subsection (a) of this section had not been enacted.

"REIMBURSEMENT FOR CONTRIBUTION DEFICIENCY

"Sec. 205. (a) For purposes of this section–

"(1) the term 'contribution deficiency', when used with respect to a covered retirement system, means the excess of–

"(A) the total amount which, but for section 204(a) of this Act, would have been deducted and withheld under a provision referred to in such section from the pay of covered employees participating in such retirement system for service to which such section applies, over

"(B) the total amount which was deducted and withheld from the pay of covered employees for such service as provided in section 204(a) of this Act; and

"(2) the term 'appropriate agency head' means–

"(A) the Director of the Office of Personnel Management, with respect to the Civil Service Retirement and Disability System under subchapter III of chapter 83 of title 5, United States Code;

"(B) the Secretary of State, with respect to the Foreign Service Retirement and Disability System under chapter 8 of the Foreign Service Retirement Act of 1980 (22 U.S.C. 404 et seq.) [22 U.S.C. 4041 et seq.];

"(C) the Director of Central Intelligence, with respect to the Central Intelligence Agency Retirement and Disability System under the Central Intelligence Agency Retirement Act (50 U.S.C. 403 note); and

"(D) the officer designated by the President for that purpose in the case of any retirement system described in section 203(a)(2)(D) of this Act.

"(b) At the end of each of fiscal years 1984, 1985, 1986, and 1987 the appropriate agency head–

"(1) shall determine the amount of the contribution deficiency for such fiscal year in the case of each covered retirement system, including the interest that those contributions would have earned had they been credited to the fund established for the payment of benefits under such retirement system in the same manner and at the same time as deductions under the applicable provision of law referred to in section 204(a) of this Act; and

"(2) shall notify the Secretary of the Treasury of the amount of the contribution deficiency in each such case.

"(c) Before closing the accounts for each of fiscal years 1984, 1985, 1986, and 1987, the Secretary of the Treasury shall credit to the fund established for the payment of

benefits under each covered retirement system, as a Government contribution, out of any money in the Treasury not otherwise appropriated, an amount equal to the amount determined under subsection (b) with respect to that covered retirement system for the fiscal year involved.

"(d) Amounts credited to a fund under subsection (c) shall be accounted for separately than amounts credited to such fund under any other provision of law.

"SPECIAL DEPOSIT AND OFFSET RULES RELATING TO RETIREMENT BENEFITS FOR INTERIM COVERED SERVICE

"Sec. 206. (a) For the purposes of this section, the term 'interim covered service' means covered service to which section 204(a) applies.

"(b)(1) Paragraphs (2) and (3) apply according to the provisions thereof only with respect to a covered employee who is employed by the Government on December 31, 1983.

"(2)(A) Notwithstanding any other provision of law, the interim covered service of such covered employee shall be considered–

"(i) in determining entitlement to and computing the amount of any annuity (other than a disability or survivor annuity) commencing under a covered retirement system during the period beginning January 1, 1984, and ending on the earlier of the date a new Government retirement system takes effect or January 1, 1987, by reason of the retirement of such covered employee during such period only if such covered employee makes a deposit to the credit of such covered retirement system for such covered

service in an amount computed as provided in subsection (f); and

"(ii) in computing a disability or survivor annuity which commences under a covered retirement system during such period and is based in any part on such interim covered service.

"(B) Notwithstanding any other provision of law, an annuity to which subparagraph (A)(ii) applies shall be reduced by the portion of the amount of any benefits which is payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] and is attributable to the interim covered service considered in computing the amount of such annuity, as determined under subsection (g), unless, in the case of a survivor annuity, a covered employee has made a deposit with respect to such covered service for the purposes of subparagraph (A)(i) before the date on which payment of such annuity commences.

"(3) Notwithstanding any other provision of law, if a new Government retirement system is not established or is inapplicable to such a covered employee who retires or dies subject to a covered retirement system after the date on which such new Government retirement system takes effect, the interim covered service of such covered employee shall be considered in determining entitlement to and computing the amount of an annuity under a covered retirement system based on the service of such covered employee only if such covered employee makes a deposit to the credit of such covered retirement system for such covered service in an amount computed as provided in subsection (f).

"(c)(1) Paragraphs (2) and (3) apply according to the provisions thereof only with respect to a covered employee

who was not employed by the Government on December 31, 1983.

"(2) Notwithstanding any other provision of law, any annuity which commences under a covered retirement system during the period described in subsection (b)(2)(A)(i) and is based, in any part, on interim covered service shall be reduced by the portion of the amount of any benefits which is payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] to the annuitant and is attributable to such service, as determined under subsection (g).

"(3) Notwithstanding any other provision of law, if a new Government retirement system is not established, the interim covered service of such a covered employee who retires or dies after January 1, 1987, shall be considered in determining entitlement to and computing the amount of an annuity under a covered retirement system based on the service of such covered employee only if such covered employee makes a deposit to the credit of such covered retirement system for such covered service in an amount computed as provided in subsection (f).

"(d) If a covered employee with respect to whom subsection (b)(3) or (c)(3) applies dies without having made a deposit pursuant to such subsection, any individual who is entitled to an annuity under a covered retirement system based on the service of such covered employee or who would be entitled to such an annuity if such deposit had been made by the covered employee before death may make such deposit after the date of death of such covered employee. Service covered by a deposit made pursuant to the first sentence shall be considered in determining, in the case of each individual to whom the first sentence applies, the entitlement to and the amount of an annuity under a covered

retirement system based on the service of such covered employee.

"(e) A reduction in annuity under subsection (b)(2)(B) or (c)(2) shall commence on the first day of the first month after the date on which payment of benefits under title II of the Social Security Act [42 U.S.C. 401 et seq.] commence and shall be redetermined each time an increase in such benefits takes effect pursuant to section 215(i) of the Social Security Act [42 U.S.C. 415(i)]. In the case of an annuity of a participant or former participant in a covered retirement system, of a surviving spouse or child of such participant or former participant, or of any other person designated by such participant or former participant to receive an annuity, under a covered retirement system (other than a former spouse) the reduction in annuity under subsection (b)(2)(B) or (c)(2) shall be calculated before any reduction in such annuity provided under such system for the purpose of paying an annuity under such system to any former spouse of such participant or former participant based on the service of such participant or former participant.

"(f) For the purposes of subsection (b) or (c), the amount of a deposit to the credit of the applicable covered retirement system shall be equal to the excess of–

> "(1) the total amount which would have been deducted and withheld from the basic pay of the covered employee for the interim covered service under such covered retirement system but for the application of section 204(a), over
>
> "(2) the amount which was deducted and withheld from such basic pay for such interim covered service pursuant to section 204(a) and was not refunded to such covered employee.

"(g) For the purpose of subsections (b)(2)(B) and (c)(2), the portion of the amount of the benefits which is payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] to an individual and is attributable to interim covered service shall be determined by–

"(1) computing the amount of such benefits including credit for such service;

"(2) computing the amount of such benefits, if any, without including credit for such service; and

"(3) subtracting the amount computed under clause (2) from the amount computed under clause (1).

"(h) The Secretary of Health and Human Services shall furnish to the appropriate agency head (as defined in section 205(a)(2)) such information as such agency head considers necessary to carry out this section.

"TRANSFER OF CREDIT TO NEW RETIREMENT SYSTEM

"Sec. 207 [Repealed. Pub.L. 99-335, Title III, § 309, June 6, 1986, 100 Stat. 607]

"ELECTIONS BY CERTAIN COVERED EMPLOYEES

"Sec. 208. (a) Any individual performing service of a type referred to in clause (i), (ii), (iii), or (iv) of section 210(a)(5) of the Social Security Act [42 U.S.C. 410(a)(5)(i)-(iv)] beginning on or before December 31, 1983, may–

"(1) if such individual is then currently a participant in a covered retirement system, elect by written application submitted before January 1, 1984–

"(A) to terminate participation in such system, effective after December 31, 1983; or

"(B) to remain under such system, as if the preceding sections of this Act and the amendments made by this Act had not been enacted; or

"(2) if such individual is then currently not a participant in a covered retirement system, elect by written application–

"(A) to become a participant under such system (if such individual is otherwise eligible to participate in the system), subject to the preceding sections of this Act and the amendments made by this Act; or

"(B) to become a participant under such system (if such individual is otherwise eligible to participate in the system), as if the preceding sections of this Act and the amendments made by this Act had not been enacted.

"(b) An application by an individual under subsection (a) shall be submitted to the official by whom such covered employee is paid.

"(c) Any individual who elects to terminate participation in a covered retirement system under subsection (a)(1)(A) is entitled to have such individual's contributions to the retirement system refunded, in accordance with applicable provisions of law, as if such individual had separated from service as of the effective date of the election.

"(d) Any individual who is eligible to make an election under subparagraph (A) or (B) of subsection (a)(1), but who does not make an election under either such subparagraph, shall be subject to the preceding sections of this Act and the amendments made by this Act."

[Amendment to section 206(c)(3) of Pub. L. 98-168 by section 305(a)(1) of Pub.L. 99-335 directing the substitution

of "January 1, 1987" for "January 1, 1986" has been executed by substituting "January 1, 1987" for "April 30, 1986" as the probable intent of Congress.]

[Section 305(b) of Pub.L. 99-335 provided that:

"(1) The amendments made by subsection (a) [amending Pub.L. 98-168 set out above] shall be effective as of May 1, 1986.

"(2) Any refund payable to an individual as a result of paragraph (1) shall be paid out of funds of the appropriate retirement system.

"(3) For purposes of this subsection, the term 'retirement system' means a covered retirement system as defined by section 203(a)(2) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (97 Stat. 1107; 5 U.S.C. 8331 note)."]

APPENDIX B

DEFICIT REDUCTION ACT OF 1984, SECTION 2206

5 U.S.C. § 8331 note

ELECTION OF RETIREMENT PLAN UNDER FEDERAL EMPLOYEES' RETIREMENT CONTRIBUTION TEMPORARY ADJUSTMENT ACT OF 1983

Pub. L. 98-369, div. B, title II, § 2206, July 18, 1984, 98 Stat. 1059, provided that:

"(a) For the purposes of this section, the term, 'covered retirement system' shall have the same meaning as provided in section 203(a)(2) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (Public Law 98-168; 97 Stat. 1107) [set out below].

"(b)(1) Any individual who was entitled to make an election under section 208(a) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (97 Stat. 1111) [set out below], but who did not make such an election, may make an election under such section not later than September 15, 1984.

"(2)(A) Not later than September 15, 1984, any such individual who made an election under paragraph (1) of section 208(a) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 [set out bleow] may–

"(i) make any other election which such individual was entitled to make under such section before January 1, 1984; or

"(ii) elect to become a participant in a covered retirement system (if such individual is otherwise eligible to participate in such system), subject to sections 201 through 207 of such Act [set out below].

"(B) Not later than September 15, 1984, any such individual who made an election under paragraph (2) of section 208(a) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 may–

"(i) make any other election which such individual was entitled to make under such section before January 1, 1984; or

"(ii) elect to terminate participation in the covered retirement system with respect to which such individual made the election under such paragraph (2).

"(3) An election under this subsection shall be made by a written application submitted to the official by whom the electing individual is paid.

"(4) An election made as provided in this subsection shall take effect with respect to service performed on or after the first day of the first applicable pay period commencing after September 15, 1984.

"(c)(1) Section 8342(a)(4) of title 5, United States Code, does not apply for the purpose of determining an entitlement to a refund under section 208(c) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (97 Stat. 1111) [set out below].

"(2) Paragraph (1) shall take effect with respect to any election made under section 208(a) of such Act or this Act before, on, or after January 1, 1984.

"(d) Nothing in this section or the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 [set out below] affects any entitlement to benefits accrued under a covered retirement system before January 1, 1984, except to the extent that any amount refunded under section 208(c) of such Act is not redeposited in the applicable retirement fund."

APPENDIX C

FEDERAL EMPLOYEES' RETIREMENT SYSTEM ACT OF 1986

5 U.S.C. § 8331 note

ELECTION OF COVERAGE UNDER CHAPTER 84

Sections 301 to 303 of Pub.L. 99-335, as amended by Pub. L. 99-556, title III, §§ 301, 302, Oct. 27, 1986, 100 Stat. 3135, 3136; Pub. L. 100-20, § 1(a), April 7, 1987, 101 Stat. 265; Pub. L. 100-238, title I, §§ 106, 107, 113(a)(1), 118, 119, 134(b), (c), Jan. 8, 1988; 101 Stat. 1746, 1747, 1750, 1752, 1764, 1765, provided that:

"SEC. 301. ELECTIONS.

"(a) ELECTIONS FOR INDIVIDUALS SUBJECT TO THE CIVIL SERVICE RETIREMENT SYSTEM.–(1)(A) Any individual (other than an individual under subsection (b)) who, as of June 30, 1987, is employed by the Federal Government, and who is then subject to subchapter III of chapter 83 of title 5, United States Code, may elect to become subject to chapter 84 of such title.

"(B) An election under this paragraph may not be made before July 1, 1987, or after December 31, 1987.

"(2)(A) Any individual who, after June 30, 1987, becomes reemployed by the Federal Government, and who is then subject to subchapter III of chapter 83 of title 5, United States Code, may elect to become subject to chapter 84 of such title.

"(B) An election under this paragraph shall not be effective unless it is made during the six-month period beginning on the date on which reemployment commences.

"(3)(A) Except as provided in subparagraph (B), any individual–

> "(i) who is excluded from the operation of subchapter III of chapter 83 of title 5, United States Code, under subsection (g), (i), (j), or (*l*) of section 8347 of such title, and
>
> "(ii) with respect to whom chapter 84 of title 5, United States Code, does not apply because of section 8402(b)(2) of such title,

shall, for purposes of an election under paragraph (1) or (2), be treated as if such individual were subject to subchapter III of chapter 83 of title 5, United States Code.

"(B) An election under this paragraph may not be made by any individual who would be excluded from the operation of chapter 84 of title 5, United States Code, under section 8402(c) of such title (relating to exclusions based on the temporary or intermittent nature of one's employment).

"(4) A member of the Foreign Service described in section 103(6) of the Foreign Service Act of 1980 [22 U.S.C. 3903(6)] shall be ineligible to make any election under this subsection.

"(b) ELECTIONS FOR CERTAIN INDIVIDUALS SERVING CONTINUOUSLY SINCE DECEMBER 31, 1983.–The following rules shall apply in the case of any individual described in section 8402(b)(1) of title 5, United States Code:

"(1) If, as of December 31, 1986, the individual is subject to subchapter III of chapter 83 of title 5, United States Code, but is not subject to section 204 of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 [section 204 of Pub.L. 98-168, set out below], the individual shall remain so subject to such subchapter unless the individual elects, after June 30, 1987, and before January 1, 1988–

"(A) to become subject to such subchapter under the same terms and conditions as apply in the case of an individual described in section 8402(b)(2) of such title [section 8402(b)(2) of this title] who is subject to such subchapter; or

"(B) to become subject to chapter 84 of such title.

An individual eligible to make an election under this paragraph may make the election described in subparagraph (A) or (B), but not both.

"(2) If, as of December 31, 1986, the individual is subject to subchapter III of chapter 83 of title 5, United States Code, and is also subject to section 204 of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 [set out below], the individual–

"(A) shall, as of January 1, 1987, become subject to such subchapter under the same terms and conditions as apply in the case of an individual described in section 8402(b)(2) of such title who is subject to such subchapter; and

"(B) may (during the six-month period described in subsection (a)(1)(B)) elect to become subject to chapter 84 of such title.

"(3)(A) If, as of December 31, 1986, the individual is not subject to subchapter III of chapter 83 of title 5, United States Code, such individual may, during the 6-month period described in subsection (a)(1)(B)–

"(i) elect to become subject to chapter 84 of such title; or

"(ii) if such individual has not since made an election described in subparagraph (B), elect to become subject to subchapter III of chapter 83 of such title under the same terms and conditions as apply in the case of an individual described in section 8402(b)(2) of such title who is subject to such subchapter.

"(B) Nothing in this paragraph shall be considered to preclude the individual from electing to become subject to subchapter III of chapter 83 of such title pursuant to notification under section 8331(2) of such title–

"(i) during the period after December 31, 1986, and before July 1, 1987; or

"(ii) after December 31, 1987, if such individual has not since become subject to subchapter III of chapter 83, or chapter 84, of such title.

"(C) Any individual who becomes subject to subchapter III of chapter 83 of such title pursuant to notification under section 8331(2) of such title after December 31, 1986, shall become subject to such subchapter under the same terms and conditions as apply in the case of an individual described in section 8402(b)(2) of such title who is subject to such subchapter.

APPENDIX D

DISQUALIFICATION OF JUSTICE, JUDGE, OR MAGISTRATE

28 U.S.C. § 455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other

interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as

director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(June 25, 1948, c. 646, 62 Stat. 908; Dec. 5, 1974, Pub. L. 93-512, § 1, 88 Stat. 1609; Nov. 6, 1978, Pub. L. 95-598, title I, § 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub. L. 100-702, title X, § 1007, 102 Stat. 4667.)

APPENDIX E

QUORUM OF SUPREME COURT JUSTICES ABSENT

28 U.S.C.A. § 2109

If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title.

In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

(June 25, 1948, c. 646, 62 Stat. 963.)

(3)

Supreme Court, U.S.
FILED
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CLERK

No. 95-1733

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
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app

TABLE OF AUTHORITIES

Cases:	Page
Evans v. *Gore*, 253 U.S. 245 (1920)	1, 2
O'Malley v. *Woodrough*, 307 U.S. 277 (1939)	1, 3
Rodriguez de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989)	2
United States v. *Gainey*, 380 U.S. 63 (1965)	1
United States v. *Will*, 449 U.S. 200 (1980)	6, 7

Constitution and statutes:

U.S. Const.:	
Art. III	2, 3, 4
§ 1 (Judges' Compensation Clause)	2, 4, 6, 7
5 U.S.C. 8334(a)(1)	5
26 U.S.C. 3101(a)	5
28 U.S.C. 371(a)	5

Miscellaneous:

Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 UCLA L. Rev. 308 (1976)	3

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1733

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. This case involves "the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). The court of appeals believed it was compelled by this Court's decision in *Evans* v. *Gore*, 253 U.S. 245 (1920), to invalidate Congress's extension of Social Security taxes to sitting judges' salaries. It observed that the Court's subsequent decision in *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), had seriously undermined the reasoning of *Evans*, but it could not conclude that *Evans* had been definitively overruled, and it therefore followed this Court's instructions to adhere to "a precedent of this Court [with] direct application in a case, [even if it] appears to rest on reasons rejected in some other line of decisions." Pet. App. 7a

(quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

Respondents make little effort to argue that the invalidation of an Act of Congress is not sufficiently important to warrant this Court's review. Rather, they contend that the court of appeals' decision was correct under an application of *Evans*. See Br. in Opp. 12-18. But, as we have argued in our petition, it is *Evans* that is wrong and warrants reconsideration. The *rationale* of *Evans*, that Article III judges' salaries are per se immune from tax under an analogy to the intergovernmental tax immunity doctrine, has long since been disapproved. See Pet. 20; Br. in Opp. 15 n.9. What is left of *Evans*, under the court of appeals' interpretation of it, is merely a *result*—that income taxes may be imposed on the salaries of new judges, but not on the salaries of judges sitting when the taxes take effect. That result is not based on the reasoning that informed *Evans*, nor is it justified by any of this Court's subsequent decisions under the Judges' Compensation Clause.

Even if *Evans* could be read to support the rule adopted by the court of appeals, it would still warrant reconsideration. As Justices Holmes and Brandeis explained in that case, the core purpose of the Judges' Compensation Clause, to protect the independence of Article III judges from political pressure, is in no way threatened by requiring judges to pay taxes that the great majority of other citizens must pay as well. See 253 U.S. at 265 (dissenting opinion). "[J]udges are also citizens," and the Judges' Compensation Clause does not grant them an "immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are

charged with administering." *O'Malley*, 307 U.S. at 282.

Moreover, the court of appeals' resurrection and reinterpretation of *Evans* threaten to do considerable mischief. As we explain in our petition (at 23-25), the court of appeals' rule would grant judges immunity from increases in the *rate* of income tax as well as from the application of a new income tax. Respondents assert that this is unlikely to be true (Br. in Opp. 24), but they do not explain why there is any analytical difference between the two situations. If it is true, as respondents argue, that new taxes imposed on judges' salaries "diminish" their pre-tax "compensation," it is hard to see how an increase in the marginal income tax rate applicable to judges' salaries from (for example) 25% to 30% would not also be an unconstitutional diminution of their compensation.

Respondents point out that, apparently, no Article III judge in the past has thought to use this argument in an attack on increases in income tax rates. See Br. in Opp. 24. Under the regime of *Evans*, however, judges' salaries were wholly immune from income tax; increases in the income tax rate were therefore irrelevant to judges at the time. After the Court in *O'Malley* strongly disapproved *Evans*, the general understanding was that even sitting judges' salaries could be made subject to a new tax (and, *a fortiori*, to increases in the tax rate) without any constitutional difficulty.[1] But now that the court of appeals has

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[1] See Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 UCLA L. Rev. 308, 333 n.94 (1976): "In O'Malley v. Woodrough, * * * the Court repudiated both *Evans* and *Miles* and held that a non-

reinterpreted *Evans* to bar the imposition of new taxes on the salaries of sitting judges and only sitting judges, *Evans* may be used in the future to attack increases in income tax rates applicable to judges' salaries.

2. Respondents argue (Br. in Opp. 18-23) that Congress's extension of Social Security taxes to sitting judges discriminated against Article III judges, and therefore violated the Judges' Compensation Clause. The court of appeals did not address that argument, but the Court of Federal Claims correctly rejected it. The trial court pointed out that, by extending Social Security taxes to federal judges, Congress brought judges into parity with the great majority of the civilian labor force that was already covered by Social Security. See Pet. App. 28a-29a. It is difficult to see how such an action can be considered discriminatory. If it were, then Congress would be powerless ever to eliminate or reduce any momentary tax advantage granted to federal judges, even if that advantage itself were not constitutionally compelled.

Respondents further argue that Congress discriminated against federal judges because it permitted other federal employees and officers, who had previously been covered by the Civil Service Retirement System (CSRS), to choose between coverage by CSRS and Social Security, but did not also permit judges to opt out of Social Security coverage and thereby avoid the old-age, survivors, and disability

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discriminatory general income tax may be applied to federal judges without diminishing judicial compensation within the meaning of the compensation clause."

insurance (OASDI) portion of Social Security taxes.[2] Br. in Opp. 18-22. Those other federal employees and officers were not similarly situated to federal judges, however. Unlike federal judges, who may retire on full salary without having made any financial contribution at all towards that annuity (see 28 U.S.C. 371(a)), other federal employees and officers covered by CSRS were (and are) required to pay something towards their retirement annuities. Under the CSRS system, seven percent of the basic pay of most federal employees is deducted to finance their retirement annuities. See 5 U.S.C. 8334(a)(1).[3]

Congress allowed some federal employees to "opt out" of Social Security, but it did so only if those employees participated in the CSRS program. Thus, Congress gave some federal employees the choice between two retirement programs, both of which require salary contributions. Congress also exempted those federal employees who elected to remain in CSRS from OASDI taxes, because otherwise those employees would be subject to a double deduction (for Social Security and for CSRS). But Congress had no occasion to give federal judges a similar election, since federal judges' full-salary retirement annuity requires no financial contribution from judges with

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[2] Respondents do not suggest that this argument applies to the hospital insurance (Medicare) portion of Social Security taxes.

[3] That percentage was, in fact, greater than the 5.7% Social Security OASDI tax on employees' wages in effect in 1983 and applied to judges' salaries at the time. See Lynn Dec. ¶ 20, C.A. App. 113. The Social Security OASDI tax rate applicable to employees' wages is currently 6.2%. See 26 U.S.C. 3101(a). Thus, the Social Security tax rate applicable to judges' salaries is less than the mandatory contribution to CSRS.

sufficient years of service, but is financed out of general tax revenues.

3. On the disqualification issue, respondents agree with us that any judges' claims arising before 1990 are now barred by the statute of limitations (Br. in Opp. 25-26). They argue, however, that judges may have a claim for diminution in compensation that occurred after 1990, and that our suggestion to the contrary is based on reasoning that was necessarily rejected in *United States* v. *Will*, 449 U.S. 200 (1980). That contention is incorrect.

Will involved challenges to alleged separate reductions, in four different years, in the statutory salaries of federal judges. The Court held that the salaries had in fact been reduced in the first and fourth of those years, and that those reductions violated the Judges' Compensation Clause. In so holding, the Court implicitly concluded that an increase in judges' salaries could not retroactively "cure" a previous unconstitutional diminution in those salaries. We do not suggest otherwise; in particular, we do not suggest (as respondents appear to believe) that any unconstitutional "diminution" in compensation that occurred when Congress first extended Social Security taxes to judges' salaries could have been retroactively cured when Congress later raised those salaries. Rather, we suggest that the financial harm attributable to any such "diminution" came to an end, because of the subsequent, substantial increase in judges' salaries, well before April, 1990. See Pet. 26 n.12.

Respondents also dismiss as "contingent and speculative" (Br. in Opp. 29) the possibility that Congress may raise income tax rates in the future. While Congress's future plans for the income tax obviously

cannot be known now, it is surely not speculative to suggest that Congress may find it necessary in the future to raise the income tax rate or to reduce the extent of deductions and credits available to reduce income tax. Under the court of appeals' reading of *Evans*, those adjustments would violate the Judges' Compensation Clause, and every federal judge's salary would likely be affected by them. The Rule of Necessity therefore permits this Court to hear and decide this case. See *Will*, 449 U.S. at 217.

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For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JULY 1996